

CRIME-FACILITATING SPEECH

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Note: This is an **abridged version** of an article published in the Stanford Law Review, vol. 57, pp. 1095-1222 (2005). **For more details, and especially for footnotes**—of which there are plenty—please see that article, either in the print version or online at <http://www1.law.ucla.edu/~volokh/facilitating.pdf>.

INTRODUCTION: THE SCOPE OF THE CRIME-FACILITATING SPEECH PROBLEM	2
I. THE USES OF CRIME-FACILITATING SPEECH.....	6
A. <i>Harmful Uses</i>	6
B. <i>Valuable Uses</i>	9
1. <i>Helping people engage in lawful behavior generally</i>	9
2. <i>Helping people evaluate and participate in public debates</i>	10
3. <i>Allowing people to complain about perceived government misconduct</i>	16
4. <i>Entertaining and satisfying curiosity</i>	16
5. <i>Self-expression</i>	18
C. <i>Dual-Use Materials</i>	18
II. CRIME-FACILITATING SPEECH AND EXISTING FIRST AMENDMENT LAW	19
III. POSSIBLE DISTINCTIONS WITHIN THE CRIME-FACILITATING SPEECH CATEGORY	19
A. <i>Distinctions Based on Value of Speech</i>	20
1. <i>First Amendment constraints on measuring the value of speech</i>	20
2. <i>Virtually no-value speech</i>	20
3. <i>Low-value speech?</i>	24
B. <i>Distinctions Based on the Speaker's Mens Rea</i>	26
1. <i>Focusing on knowledge that speech will likely facilitate crime or recklessness about this possibility</i>	26
2. <i>Focusing on purpose to facilitate crime</i>	30
C. <i>Distinctions Based on How Speech Is Advertised or Presented</i>	41
1. <i>Focusing on whether speech is advertised or presented as crime- facilitating</i>	41
2. <i>Focusing on whether speech is advertised or presented as an argument rather than just as pure facts</i>	48
D. <i>Distinctions Based on the Harms the Speech Facilitates</i>	49
1. <i>Focusing on whether the speech facilitates severe harms</i>	49
E. <i>Distinctions Based on Imminence of Harm</i>	54
F. <i>Distinctions Between Criminal Punishments and Civil Liability</i>	54
G. <i>Summary: Combining the Building Blocks</i>	55
CONCLUSION.....	57

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INTRODUCTION: THE SCOPE OF THE CRIME-FACILITATING SPEECH PROBLEM

Some speech provides information that makes it easier for people to commit crimes, torts, or other harms. Consider:

(a) A textbook,^{*1} magazine,[†] Web site,[†] or seminar describes how people can make bombs (conventional[†] or nuclear[†]), make guns,^{*} make drugs,[†] commit contract murder,[†] engage in sabotage,[†] painlessly and reliably commit suicide,[†] fool ballistic identification systems or fingerprint recognition systems,^{*} pick locks,[†] evade taxes,[†] or more effectively resist arrest during civil disobedience.^{*}

(b) A thriller or mystery novel does the same, for the sake of realism.^{*}

(c) A Web site or a computer science article explains how messages can be effectively encrypted (which can help stymie law enforcement),^{†2} how encrypted copyrighted material can be illegally decrypted,[†] what security flaws exist in a prominent computer operating system,[†] or how computer viruses are written.^{*}

(d) A newspaper publishes the name of a witness to a crime, thus making it easier for the criminal to intimidate or kill the witness.[†]

(e) A leaflet or a Web site gives the names and possibly the addresses of boycott violators,[†] abortion providers,[†] strikebreakers, police officers,[†] police informants,[†] anonymous litigants,[†] registered sex offenders,[†] or political convention delegates.^{*}

(f) A Web site posts people's social security numbers[†] or credit card numbers, or the passwords to computer systems.[†]

(g) A newspaper publishes the sailing dates of troopships,[†] secret military plans,[†] or the names of undercover agents in enemy countries.[†]

(h) A Web site or a newspaper article names a Web site that contains copyright-infringing material, or describes it in enough detail that readers could quickly find it using a search engine.[†]

(i) A Web site sells or gives away research papers, which helps students cheat.

1. The symbol “†” marks speech that has actually led to litigation, prosecution, or threatened prosecution, or is fairly explicitly covered by a statute that would authorize such legal action. The symbol “*” marks speech that has indeed been published, and that could potentially lead to such legal action, but that to my knowledge has not yet led to it. For many citations to the relevant statutes and cases, please see Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1097-1102 nn.1-40 (2005), at <http://www1.law.ucla.edu/~volokh/facilitating.pdf>.

2. I set aside for purposes of this Article the debate whether restrictions on computer source code should be treated as content-based speech restrictions. If source code restrictions should be treated as content-based, then the analysis in this Article applies to them. If they shouldn't—for instance, because they're seen as restrictions on the functional aspect of the code (since the code can be directly compiled into object code and executed, without a human reading it) rather than the expressive aspect—then this Article's analysis would still apply to the human-language descriptions of the algorithm that the source code embodies, which are dangerous precisely because they communicate to humans.

(j) A magazine describes how one can organize one's tax return to minimize the risk of a tax audit,^{*} share music files while minimizing the risk of being sued as an infringer,^{*} or better conceal one's sexual abuse of children.^{*}

(k) A newspaper publishes information about a secret subpoena,[†] a secret wiretap,[†] a secret grand jury investigation, or a secret impending police operation,[†] and the suspects thus learn they are being targeted; or a library, Internet service provider, bank, or other entity whose records are subpoenaed alerts the media to complain about what it sees as an abusive subpoena.[†]

(l) When any of the speech mentioned above is suppressed, a self-styled anticensorship Web site posts a copy, not because its operators intend to facilitate crime, but because they want to protest and resist speech suppression or to inform the public about the facts underlying the suppression controversy.^{*}

(m) A master criminal advises a less experienced friend on how best to commit a crime, or on how a criminal gang should maintain discipline and power.[†]

(n) A supporter of sanctuary for El Salvadoran refugees tells a refugee the location of a hole in the border fence, and the directions to a church that would harbor him.[†]

(o) A lookout,[†] a friend,[†] or a stranger who has no relationship with the criminal but who dislikes the police[†] warns a criminal that the police are coming.

(p) A driver flashes his lights to warn other drivers of a speed trap.^{†3}

These are not incitement cases: The speech isn't persuading or inspiring some readers to commit bad acts. Rather, the speech is giving people information that helps them commit bad acts—acts that they likely already want to commit.⁴

When should such speech be constitutionally unprotected? Surprisingly, the Supreme Court has never squarely confronted this issue, and lower courts and commentators have only recently begun to seriously face it. And getting the answer right is important: Because these scenarios are structurally similar—a similarity that hasn't been generally recognized—a decision about one of them will affect the results in others. If a restriction on one of these kinds of

3. This is tantamount to the driver's acting as a lookout: It lets the other drivers drive illegally before and after the speed trap without getting caught, because they have been warned to obey the law when the police are watching.

4. As Parts I.A and III.E explain, crime-inciting speech and crime-facilitating speech differ considerably in how they cause harm and how they are valuable, so they are usefully analyzed as separate First Amendment categories. Likewise, crime-facilitating speech cases are different from copycat-inspiring cases, where movies or news accounts inspire copycat crimes but don't give criminals any useful and nonobvious information about how to commit those crimes. The danger of speech that inspires copycat crimes is that it leads some viewers to want to commit crimes (even if that's not the speaker's purpose). This is the same sort of danger that crime-advocating speech poses, which is why copycat crime cases are generally analyzed using the incitement test.

speech is upheld (or struck down), others may be unexpectedly validated (or invalidated) as well.

In this Article, I'll try to analyze the problem of crime-facilitating speech, a term I define to mean

- (1) any communication that,
- (2) intentionally or not,
- (3) conveys information that
- (4) makes it easier or safer for some listeners or readers (a) to commit crimes, torts,⁵ acts of war (or other acts by foreign nations that would be crimes if done by individuals), or suicide, or (b) to get away with committing such acts.⁶

In Part III.G, I'll outline a proposed solution to this problem; but my main goal is to make observations about the category that may be useful even to those who disagree with my bottom line.

The first observation is the one with which this Article began: *Many seemingly disparate cases are linked because they involve crime-facilitating speech*, so the decision in one such case may affect the decisions in others. The crime-facilitating speech problem looks different if one is just focusing on the *Hit Man* contract murder manual than if one is looking at the broader range of cases.

It may be appealing, for instance, to categorically deny First Amendment protection to murder manuals or to bomb-making information, on the ground that the publishers know that the works may help others commit crimes, and such knowing facilitation of crime should be constitutionally unprotected. But such a broad justification would equally strip protection from newspaper articles that mention copyright-infringing Web sites, academic articles that discuss computer security bugs, and mimeographs that report who is refusing to comply with a boycott.

5. I include torts as well as crimes because both are generally seen as harmful actions, the facilitating of which might be potentially punishable. Tortious but noncriminal conduct is less harmful than criminal conduct, so restrictions on speech that facilitates purely tortious conduct may be less justified. But I think it's better to consider this as a potential distinction based on how harmful the facilitated conduct is, *see infra* Part III.D, rather than to rule out tort-facilitating speech at the start.

I use the term "crime-facilitating" rather than a broader term such as "harm-facilitating" because it seems to me clearer and more concrete (since "harm" could include many harms, including offense, spiritual degradation, and more), and because most of the examples I give do involve criminal conduct.

6. Helping criminals get away with crimes can be as harmful as helping them commit crimes; among other things, a criminal who knows he'll have help escaping is more likely to commit the crime in the first place, and a criminal who escapes will be free to continue his criminal enterprise and to commit more crimes in the future. This is why lookouts are treated like other aiders and abettors, and why criminal law has long criminalized the accessory after the fact, who helps hide a criminal, as well as the accessory before the fact.

If one wants to protect the latter kinds of speech, but not the contract murder manual, one must craft a narrower rule that distinguishes different kinds of crime-facilitating speech from each other. And to design such a rule—or to conclude that some seemingly different kinds of speech should be treated similarly—it’s helpful to think about these problems together, and use them as a “test suite” for checking any proposed crime-facilitating speech doctrine.

The second observation, which Part I.C will discuss, is that most crime-facilitating speech is an instance of what one might call *dual-use material*. Like weapons, videocassette recorders, alcohol, drugs, and many other things, many types of crime-facilitating speech have harmful uses; but they also have valuable uses, including some that may not at first be obvious.

Moreover, it’s often impossible for the distributor to know which consumers will use the material in which way. Banning the material will prohibit the valuable uses along with the harmful ones.⁷ Allowing the material will allow the harmful uses alongside the valuable ones. This dual-use nature has implications for how crime-facilitating speech should be treated.

Part II (omitted in the abridged version) then observes that *restrictions on crime-facilitating speech can’t be easily justified under existing First Amendment doctrine*. Part II.A of the unabridged version describes the paucity of existing constitutional law on the subject, and Parts II.B, II.C, and II.D discuss the possibility that strict scrutiny, “balancing,” or deference to legislative judgment can resolve this problem.

Part III discusses *distinctions that the law might try to draw* within the crime-facilitating speech category to minimize the harmful uses and maximize the valuable ones.⁸ These distinctions are the possible building blocks of a crime-facilitating speech exception, but it turns out that such distinctions are not easy to devise. In particular, one seemingly appealing distinction—between speech intended to facilitate crime, and speech that is merely said with knowledge that some readers will use it for criminal purposes—turns out to be less helpful than might at first appear. Many other possible distinctions end up being likewise unhelpful, though a few are promising.

Building on this analysis, Part III.G provides a suggested rule: that crime-facilitating speech ought to be constitutionally protected unless (1) it’s said to a person or a small group of people when the speaker knows *these few listeners are likely to use the information for criminal purposes*, (2) it’s within one of the few classes of *speech that has almost no noncriminal value*, or (3) it can

7. I use “ban” to refer both to criminal prohibitions and civil liability. First Amendment law treats the two identically, and so do I, for reasons described in Part III.F.

8. I focus on distinctions that might be helpful when the government is acting as sovereign, using its regulatory power to restrict speech even by private citizens. The rules will likely be different when the government is acting as employer or as contractor, disclosing information to employees or others but on the contractual condition that they not communicate the information to others. I also do not deal with harm-facilitating speech that’s aimed largely at minors.

cause *extraordinarily serious harm* (on the order of a nuclear attack or a plague) even when it's also valuable for lawful purposes. But I hope the analysis in Part III will be helpful even to those who would reach a different conclusion. And even if courts ultimately hold that legislatures and courts should have broad constitutional authority to restrict a wide range of crime-facilitating speech, some of the analysis may help legislators and judges decide how they should exercise that authority.⁹

Finally, the Conclusion makes a few more observations, one of which is worth foreshadowing here: While crime-facilitating speech cases arise in all sorts of media, and should be treated the same regardless of the medium, *the existence of the Internet makes a difference* here. Most importantly, by making it easy for people to put up mirror sites of banned material as a protest against such bans, the Internet makes restrictions on crime-facilitating speech less effective, both practically and (if the restrictions are cast in terms of purpose rather than mere knowledge) legally.

I. THE USES OF CRIME-FACILITATING SPEECH

A. Harmful Uses

Information can help people commit crimes. It makes some crimes possible, some crimes easier to commit, and some crimes harder to detect and thus harder to deter and punish.

The danger of crime-facilitating speech is related to that posed by crime-*advocating* speech. To commit a typical crime, a criminal generally needs to have three things:

- (1) the desire to commit the crime,
- (2) the knowledge and ability to do so, and
- (3) either (a) the belief that the risk of being caught is low enough to make the benefits exceed the costs,¹⁰ (b) the willingness—often born of rage or felt ideological imperative—to act without regard to the risk, or (c) a careless disregard for the risk.

Speech that advocates, praises, or condones crime can help provide the desire, and, if the speech urges imminent crime, the rage. Crime-facilitating speech helps provide the knowledge and helps lower the risk of being caught.

9. The analysis may also be helpful for courts that want to analyze the question under state constitutional free speech guarantees. I will *not*, however, discuss (1) how individual speakers or publishers should decide whether to endanger others by publishing crime-facilitating speech, or (2) when people should condemn speakers or publishers who publish such speech.

10. The benefits and costs can of course be tangible—financial benefit or the cost of being imprisoned or fined—or intangible, such as emotional benefit or the cost of feeling that one has hurt someone or violated social norms.

But the danger of crime-facilitating speech may be greater than the danger of crime-advocating speech (at least setting aside the speech that advocates imminent crime, which may sometimes be punished under the incitement exception). Imagine two people: One knows how to commit a crime with little risk of getting caught, but doesn't want to commit it. The other doesn't know how to commit the crime and escape undetected, but would be willing to commit it if he knew.

Advocacy of crime may persuade the first person to break the law and to incur the risk of punishment, but it will generally do it over time, building on past advocacy and laying the foundation for future advocacy. No particular statement is likely to have much influence by itself. What's more, over time the person may be reached by counteradvocacy, and in our society there generally is plenty of counteradvocacy, explicit or implicit, that urges people to follow the law. This counteradvocacy isn't perfect, but it will often help counteract the desire brought on by the advocacy (element 1).

But information that teaches people how to violate the law, and how to do so with less risk of punishment, can instantly and irreversibly satisfy elements 2 and 3a. Once a person learns how to make a bomb, or learns where a potential target lives, that information can't be rebutted through counteradvocacy, and needs no continuing flow of information for reinforcement. So crime-facilitating speech can provide elements 2 and 3a more quickly and less reversibly than crime-advocating speech can provide elements 1 and 3b.¹¹

Any attempts to suppress crime-facilitating speech will be highly imperfect, especially in the Internet age. Copies of instructions for making explosives, producing illegal drugs, or decrypting proprietary information will likely always be available somewhere, either on foreign sites or on American sites that the law hasn't yet shut down or deterred. The *Hit Man* contract murder manual, for instance, is available for free on the Web, even though a civil lawsuit led its publisher to stop distributing it. (If the civil lawsuit that led the publisher to stop selling the book also made the publisher more reluctant to try to enforce the now-worthless copyright, the suit might thus have actually made the book more easily, cheaply, and anonymously available.)

Versions of *The Anarchist Cookbook* are likewise freely available online, and likely will continue to be, even if the government tries to prosecute sites that distribute it. Holding crime-facilitating speech to be constitutionally unprotected, and prosecuting the distributors of such speech, may thus not prevent that much crime.

11. Naturally, even if crime-facilitating speech provides elements 2 and 3a, speech that argues against committing a crime can help prevent element 1 from being satisfied. I am not claiming that crime-facilitating speech by itself guarantees that a crime will be committed, only that it contributes to such crimes, and on average does so more than crime-advocating speech does.

Yet these restrictions are still likely to have some effect, even if not as much as their proponents might like. Crime-facilitating information is especially helpful to criminals if it seems reliable and well-tailored to their criminal tasks. If you want to build a bomb, you don't just want a bomb-making manual—you want a manual that helps you build the bomb without blowing yourself up, and that you trust to do that. The same is true, in considerable measure, for instructions on how to avoid detection while committing crimes.

The legal availability of crime-facilitating information probably increases the average quality—and, as importantly, the perceived reliability—of such information. An arson manual on the Earth Liberation Front's Web site, or an article in *High Times* magazine on growing or manufacturing drugs, will probably be seen as more trustworthy than some site created by some unknown stranger. It will often be more accurate and helpful, because of the organization's greater resources and greater access to expertise. The organization is more likely to make sure that its version is the correct one, and doesn't include any potentially dangerous alterations that versions on private sites might have. Moreover, because the information is high profile, and available at a well-known location, it's more likely to develop a reputation among (for instance) ecoterrorists or drug-growers; more people will have expressed opinions on whether it's trustworthy or not.

On the other hand, if crime-facilitating information is outlawed, these mechanisms for increasing the accuracy and trustworthiness of the information will be weakened. The data might still be easily available through a Google search, but some of it will contain errors, and it will be less likely to have the reputation of a prominent group or magazine behind it. In marginal cases, this might lead some criminals to use less accurate and helpful information, or be scared off to less dangerous crimes by the uncertainty.

Serious criminals, who are part of well-organized criminal or terrorist networks, will likely get trustworthy crime-facilitating instructions regardless of what the law may try to do. But small-time criminals or tortfeasors may well be discouraged by the lack of seemingly reliable publicly available instructions.¹² Restrictions on crime-facilitating speech may thus help stop at least some extremists who want to bomb multinational corporations, abortion clinics, or animal research laboratories; some would-be novice computer hackers or solo drugmakers; and some people who want to illegally download pirate software or movies, or to cheat by handing in someone else's term paper.

Moreover, some kinds of crime-facilitating information might not be available except from a few speakers, either because the information is about a new

12. For instance, if people aren't allowed to post the detailed code for viruses, then the "script kiddies"—relatively unskilled exploiters of viruses—might find it much harder to launch malicious attacks; and this may remain so even if the virus experts remain free to post English-language descriptions of the algorithms, since many script kiddies may not have the knowledge necessary to translate the algorithm into the detailed code.

invention, or because it contains details about specific items, events, or places: for instance, particular subpoenas issued by government agencies who are investigating particular suspects, passwords to particular computers, or the layout of particular government buildings. This information is likely to be initially known to only a few people, and not widely spread on hundreds of computers. If those few people are deterred from posting the material, or if the material is quickly ordered to be taken down from the Internet locations on which it's posted (and any search engine caches that may contain it), then potential criminal users—both serious professional criminals and solo, novice offenders—might indeed be unable to get it.

B. *Valuable Uses*

Speech that helps some listeners commit crimes, however, may also help others do legal and useful things. Different people, of course, have different views on what makes speech “valuable,” and the Supreme Court has been notoriously reluctant to settle on any theory as being the sole foundation of First Amendment law. But the Court has pretty consistently treated as “valuable” a wide range of commentary, whether it covers facts or ideas, whether it's argument, education, or entertainment, and whether it's politics, religion, science, or art.

There will doubtless be much controversy about when crime-facilitating speech is so harmful that the harm justifies restricting it despite its value. But there'll probably be fairly broad agreement that, as the following subsections suggest, much crime-facilitating speech indeed has at least some First Amendment value.¹³

1. *Helping people engage in lawful behavior generally*

Much crime-facilitating speech can educate readers, or give them practical information that they can use lawfully. Some of this information is applied science. Books about explosives can teach students principles of chemistry, and can help engineers use explosives for laudable purposes.¹⁴ Books that explain how to investigate arson, homicide, or poisoning can help detectives and would-be detectives, though they can also help criminals learn how to evade detection.

Discussions of computer security problems, or of encryption or decryption algorithms, can educate computer programmers who are working in the field or

13. These Parts aren't meant to be mutually exclusive; I identify the different kinds of value only to better show that crime-facilitating speech can be valuable in different ways.

14. Some books discuss how explosives (or drugs) are made. Others discuss how explosives can be used to effectively produce the desired destruction with minimal risk to the user.

who are studying the subjects (whether in a formal academic program or on their own). Such discussions can also help programmers create new algorithms and security systems. Scientific research is generally thought to advance more quickly when scientists and engineers are free to broadly discuss their work.

Nonscientific information can be practically useful, too. Descriptions of common scams can help put people on their guard. Descriptions of flaws in security systems can help people avoid these flaws.¹⁵ Tips on how to minimize the risk of being audited may help even law-abiding taxpayers avoid the time and expense of being audited, and not just help cheaters avoid being caught cheating. Some explanations of how some police departments catch criminals can help corporate security experts, private detectives, or other police departments investigate crimes, though the explanations can also alert criminals about what mistakes to avoid.

Instructions on decrypting videos may help people engage in fair uses as well as unlawful ones; some of these fair uses may help the users engage in speech (such as parody and commentary) of their own. Knowing who is a boycott violator, a strikebreaker, or an abortion provider can help people make choices about whom to associate with—choices that may be morally important to them. Knowing who is a sex offender can help people take extra precautions for themselves and for their children.

Likewise, speech that teaches drug users how to use certain illegal drugs more safely has clear medical value—it may prevent death and illness among many people who would have used drugs in any event—but it also facilitates crime. Just as speech that teaches people how to commit crimes with less risk of legal punishment is crime-facilitating, so is speech that teaches people how to commit crimes with less risk of injury. Such “harm reduction” speech might embolden some people to engage in the illegal drug use; and some proposed crime-facilitation statutes would outlaw such speech (whether deliberately or inadvertently), because the speech conveys “information pertaining to . . . use of a controlled substance, with the intent that . . . [the] information be used for, or in furtherance of” drug use.

2. *Helping people evaluate and participate in public debates*

a. *Generally*

15. See, e.g., Matt Blaze, *Cryptology and Physical Security: Rights Amplification in Master-Keyed Mechanical Locks*, IEEE SECURITY & PRIVACY, Mar.-Apr. 2003, at 24 (describing how someone can easily produce a master key for many lock designs so long as one has a nonmaster key to one of the many locks that the master key opens); *id.* (arguing that this should lead people to adopt more threat-resistant designs); Matt Blaze, *Keep It Secret, Stupid!*, at <http://www.crypto.com/papers/kiss.html> (Jan. 26, 2003) (defending the decision to publish this information); Matt Blaze, *Is It Harmful To Discuss Security Vulnerabilities?*, at <http://www.crypto.com/hobbs.html> (last revised Jan. 2005) (likewise).

Some speech that helps criminal listeners commit crimes may at the same time be relevant to law-abiding listeners' political decisions. Publishing information about secret wiretaps or subpoenas, for instance, may help inform people about supposed government abuses of the wiretap or subpoena power. And such concrete and timely examples of alleged abuse may be necessary to persuade the public or opinion leaders to press for changes in government policies: A general complaint that some unspecified abuse is happening somewhere will naturally leave most listeners skeptical.

Likewise, publishing the names of crime witnesses can help the public evaluate whether the witnesses' stories are credible or not. Publishing the names (or even addresses) of people who aren't complying with a boycott may facilitate legal and constitutionally protected shunning, shaming, and persuasion of the noncompliers. Publishing the names and addresses of abortion providers may facilitate legal picketing of their homes. Publishing a description of how H-bombs operate can help explain why the government engages in certain controversial nuclear testing practices, or why it wants to build expensive and potentially dangerous new plants.

None of this means the information is harmless: Publishing secret wiretap information may help criminals conceal their crimes, by informing them that they're under suspicion and that certain phones are no longer safe to use; publishing boycotters', abortion providers', or convention delegates' names and addresses can facilitate violence as well as lawful remonstrance and social ostracism. But the speech would indeed be valuable to political discourse when communicated to some listeners, even if it's harmful in the hands of others.

b. By informing law-abiding people how crimes are committed

Some crime-facilitating speech may also affect law-abiding people's political judgments precisely by explaining how crimes are committed.

(1) Such speech can help support arguments that some laws are futile. For instance, explaining how easy it is for people to grow marijuana inside their homes may help persuade the public that the war on marijuana isn't winnable—or is winnable only through highly intrusive policing—and perhaps should be abandoned. Likewise, some argue that the existence of offshore copyright-infringing sites shows that current copyright law is unenforceable, and should thus be changed or repealed. But the validity of the argument turns on whether such sites indeed exist, have an appealing mix of bootleg content, and are easy to use. A pointer to such a site, which law-abiding people can follow to examine the site for themselves, can thus provide the most powerful evidence for the argument.¹⁶

16. There is nothing illegal about a curious user's simply looking at such a site, or even listening to some bootleg content just to figure out what's available; even if any copying happens in the process, the user's actions would be fair use, because they'd be noncom-

Explaining how easy it is to make gunpowder, ammunition, or guns may support arguments that criminals can't be effectively disarmed.¹⁷ Explaining how one can deceive fingerprint recognition mechanisms can be a powerful argument against proposed security systems that rely on those mechanisms.¹⁸ Explaining how easy it is to change the "ballistic fingerprint" left by a gun may rebut arguments in favor of requiring that all guns and their "fingerprints" be registered.¹⁹ Pointing to specific ways that hijackers can evade airport metal-

mercial and wouldn't affect the market for the work. The site would thus facilitate both legal use by curious users who are trying to decide whether copyright law is a lost cause, and illegal use by other users who want to get material without paying for it.

17. See, e.g., Bruce Barak Koffler, *Zip Guns and Crude Co[n]versions—Identifying Characteristics and Problems* (pt. 2), 61 J. CRIM. L. CRIMINOLOGY & POL. SCI. 115, 125 (1970) (discussing in detail the design of various homemade guns, mostly for the benefit of forensic investigators, but also concluding that "[i]n a city that has probably the most restrictive pistol laws on the continent, we have an example of how such legislation fails to achieve its purpose" because of how easily people can make their own guns, and that "[w]hen we ask for stricter gun ownership legislation in [the] future, this is something to bear in mind"); cf. J. DAVID TRUBY & JOHN MINNERY, *IMPROVISED MODIFIED FIREARMS: DEADLY HOMEMADE WEAPONS*, at outside back cover, 7, 10, 13 (1992) (arguing that "[t]he message is clear: if you take away a free people's firearms, it will make others. As these pages demonstrate, the methods, means, and technology are simple, convenient, and in place" and that "[t]he object lesson" is that "[g]un prohibition doesn't work," but not in fact providing specific details about how guns can be made at home); BILL HOLMES, *HOME WORKSHOP GUNS FOR DEFENSE AND RESISTANCE: THE HANDGUN* (1979) (providing those details). Many people might not be persuaded by the combination of these last two books—for instance, some might believe that many fewer criminals would get guns if they had to rely on homemade or black market weapons. But the two books put together still make an important political argument, one that can't be made as effectively without the descriptions of how easy home gunmaking supposedly is.

18. See, e.g., Ton van der Putte & Jeroen Keuning, *Biometrical Fingerprint Recognition*, in *IFIP TC8/WG8.8 FOURTH WORKING CONFERENCE ON SMART CARD RESEARCH AND ADVANCED APPLICATIONS* 289, 291 (Josep Domingo-Ferrer et al. eds., 2000), http://www.keuning.com/biometry/Biometrical_Fingerprint_Recognition.pdf ("This article should be read as a warning to those thinking of using new methods of identification without first examining the technical opportunities for compromising the identification mechanism and the associated legal consequences."); *id.* at 294 ("The biggest problem when using biometrical identification on the basis of fingerprints is the fact that, to the knowledge of the authors, none of the fingerprint scanners that are currently available can distinguish between a finger and a well-created dummy. Note that this is contrary to what some of the producers of these scanners claim in their documentation. We will prove the statement by accurately describing two methods to create dummies that will be accepted by the scanners as true fingerprints."); *id.* at 294-99 (providing such detailed methods, which they claim can be followed in half an hour at the cost of twenty dollars).

19. See, for example, Bill Twist, *Erasing Ballistic Fingerprints*, PLANET TIMES.COM, June 28, 2000, at http://216.117.156.23/features/barrel_twist/2000/june/erase.shtml, which describes how this can be done, and concludes with:

So why am I telling you all of this? Well, I have heard [of a proposed mandatory ballistic signature recording system] called "ballistic fingerprinting" and "gun DNA." It is neither. . . . It is not easy to change your fingerprints, and it is impossible to change your DNA (so far). Changing the marks a firearm makes on bullets and cases is a trivial exercise. . . . [T]he calls for "ballistic fingerprinting" are a big lie, to appease those who have an ingrained fear of firearms.

detecting equipment can support an argument that such equipment does little good, that the government is wasting money and unjustifiably intruding on privacy, and that it's better to invest money and effort in arming pilots, encouraging passengers to fight back, and so on.²⁰

(2) Some descriptions of how crimes can be committed may help show readers that they or others need to take certain steps to prevent the crime. Publishing detailed information about a computer program's security vulnerabilities may help security experts figure out how to fix the vulnerabilities, persuade apathetic users that there really is a serious problem, persuade the media and the public that some software manufacturer isn't doing its job, and support calls for legislation requiring manufacturers to do better.²¹ Publicly explaining how Kryptonite bicycle locks can be easily defeated with a Bic pen can pressure the company to replace such locks with more secure models.²² Publishing detailed information about security problems—for instance, gaps in airport security, in

The effectiveness of such registries is still very much an open question, but it's clear that Twist's concerns are legitimate, even if they don't ultimately prove dispositive

20. See, for example, Bruce Schneier, *More Airline Insecurities*, CRYPTO-GRAM NEWSLETTER, Aug. 15, 2003, at <http://www.schneier.com/crypto-gram-0308.html>, which describes how one can supposedly smuggle plastic explosives onto a plane, or build a knife out of steel epoxy glue on the plane itself, and concludes, "The point here is to realize that security screening will never be 100% effective. There will always be ways to sneak guns, knives, and bombs through security checkpoints. Screening is an effective component of a security system, but it should never be the sole countermeasure in the system."

21. See, for example, Laura Blumenfeld, *Dissertation Could Be Security Threat*, WASH. POST, July 8, 2003, at A1, which describes a geography Ph.D. dissertation that contains a map of communication networks. The map, if published, might be useful to terrorists but also to citizens concerned about whether the government and industry are doing enough to secure critical infrastructure:

Some argue that the critical targets should be publicized, because it would force the government and industry to protect them. "It's a tricky balance," said Michael Vatis, founder and first director of the National Infrastructure Protection Center. Vatis noted the dangerous time gap between exposing the weaknesses and patching them: "But I don't think security through obscurity is a winning strategy."

See also BRUCE SCHNEIER, *APPLIED CRYPTOGRAPHY 7* (1996) ("If the strength of your new cryptosystem relies on the fact that the attacker does not know the algorithm's inner workings, you're sunk. If you believe that keeping the algorithm's insides secret improves the security of your cryptosystem more than letting the academic community analyze it, you're wrong.") (speaking specifically about the security of cryptographic algorithms).

Computer security experts who find a vulnerability will often report it just to the software vendor, and this is often the more responsible solution. But if the vendor pooh-poohs the problem, then the security expert may need to describe the problem as part of his public argument that the vendor isn't doing a good enough job.

22. See David Kirpatrick et al., *Why There's No Escaping the Blog*, FORTUNE, Jan. 10, 2005, at 44 (discussing how publicizing the details eventually led Kryptonite to switch from its initial reaction—"issu[ing] a bland statement saying the locks remained a 'deterrent to theft' and promising that a new line would be 'tougher'"—to "announc[ing] it would exchange any affected lock free," which it expected would involve sending out over 100,000 new locks).

security of government computer systems, or in security against bioterror—can show that the government isn't doing enough to protect us.²³ Likewise, publishing information about how easy it is to build a nuclear bomb may alert people to the need to rely on diplomacy and international cooperation, rather than secrecy, to prevent nuclear proliferation.²⁴

(3) Descriptions of how crimes are committed can help security experts design new security technologies. Knowledge in other fields often develops through specialists—whether academics, employees of businesses, or amateurs—publishing their findings, openly discussing them, and correcting and building on each other's work: That's the whole point of professional journals, working papers, and many conferences and online discussion groups. The same is true of security studies, whether that field is seen as a branch of computer science, cryptography, criminology, or something else. And knowledge of the flaws in existing security schemes is needed to design better ones.

In a very few fields, such as nuclear weapons research, this scientific exchange has traditionally been done through classified communications, available to only a few government-checked and often government-employed professionals. But this is definitely not the norm in American science, and it seems likely that broadening such zones of secrecy would interfere with scientific progress. Perhaps in some fields secrecy is nonetheless necessary, because the risks of open discussion are too great. Nonetheless, even if we ultimately conclude that the speech is too harmful to be allowed, we must concede that such open discussion does have scientific value, and, directly or indirectly, political value.

(4) While detailed criticisms of possible problems in a security system (whether computer security or physical security) can help alert people to the need to fix those problems, the absence of such criticisms—in a legal environment where detailed criticisms are allowed—can make people more confident that the system is indeed secure. If we know that hundreds of security experts from many institutions have been able to discuss potential problems in some security system, that journalists are free to follow and report on these debates, and that the experts and the press seem confident that no serious problems have been found, then we can be relatively confident that the system is sound.

23. See, e.g., Bob Newman, *Airport Security for Beginners*, DENVER POST, May 16, 2002, at A21 (“A security screener, who when asked why he wanted to see the backside of my belt buckle, said he wasn't really sure (I told him he was supposed to be checking for a 'push' dagger built into and disguised by the buckle). Not a single security screener . . . had ever heard of a carbon-fiber or titanium-blade (nonferrous) knife, which can pass through standard magnetometers used at most airports. . . . Yet the government insists that new security procedures have made airports much more secure, despite the above incidents . . .”); Andy Bowers, *A Dangerous Loophole in Airport Security: If Slate Could Discover It, the Terrorists Will, Too*, SLATE.COM, Feb. 7, 2005, at <http://www.slate.com/id/2113157/>.

24. See, e.g., ALEXANDER DE VOLPI ET AL., *BORN SECRET* (1981) (noting ways in which the information revealed in the *Progressive* article was relevant to important policy debates).

But this confidence is justified only if we know that people are indeed free to discuss these matters, both with other researchers and with the public, and both through the institutional media and directly. Restricting speech about security holes thus deprives the public of important information: If the security holes exist, then the public can't learn about them; if they don't exist, then the public can't be confident that the silence about the holes flows from their absence, rather than from the speech restriction.²⁵

(5) In all these situations, as elsewhere, concrete, specific details are more persuasive than generalities: People are more likely to listen if you say "Microsoft is doing a bad job—I'll show this by explaining how easy it is for someone to send a virus through Microsoft Outlook" than if you say "Microsoft is doing a bad job—I've identified an easy way for someone to send a virus through Outlook, but I can't tell you what it is."²⁶

Even readers who can't themselves confirm that the details are accurate will find detailed accounts more trustworthy because they know that other, more expert readers could confirm or rebut them. If a computer security expert publishes an article that gives a detailed explanation of a security problem, other security experts could check the explanation. A journalist reporting on the allegations could call an expert whom he trusts and get the expert to confirm the charges.

The journalists could also monitor a prominent online expert discussion group to see whether the experts agree or disagree. And if there is broad agreement, a journalist can report on this, and readers can feel confident that the claim has been well vetted. That is much less likely to happen if the original discoverer of the error was only allowed to write, "There's a serious bug in this program," and was legally barred from releasing supporting details.

25. See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known.").

26. See Bruce Schneier, *Full Disclosure*, CRYPTO-GRAM NEWSLETTER, Nov. 15, 2001, at <http://www.schneier.com/crypto-gram-0111.html> ("[Revealing] detailed information is required. If a researcher just publishes vague statements about the vulnerability, then the vendor can claim that it's not real. If the researcher publishes scientific details without example code, then the vendor can claim that it's just theoretical."). Disclosing specific details of a computer security problem can also motivate computer companies to fix it, simply because they know that if they don't fix the problem immediately, hackers will exploit it. See *id.* (arguing that full disclosure has helped transform "the computer industry . . . from a group of companies that ignores security and belittles vulnerabilities into one that fixes vulnerabilities as quickly as possible").

3. *Allowing people to complain about perceived government misconduct*

The ability to communicate details about government action, even when these details may facilitate crime, may also be a check on potential government misconduct. When the government does something that you think is illegal or improper—uses your property for purposes you think are wrong, forces you to turn over documents, orders you to reveal private information about others, arrests someone based on the complaint of a witness whom you know to be unreliable, and so on—one traditional remedy is complaining to the media. The existence of this remedy lets the public hear allegations that the government is misbehaving, and deters government conduct that is either illegal or is technically legal but likely to be viewed by many people as excessive.

Some laws aimed at preventing crime-facilitating speech eliminate or substantially weaken this protection against government overreaching. Consider laws barring people (including librarians or bookstore owners) from revealing that some of their records have been subpoenaed, or barring Internet service providers or other companies from revealing that their customers are being eavesdropped on. Those private entities that are ordered to turn over the records or help set up the eavesdropping will no longer be legally free to complain, except perhaps much later, when the story is no longer timely and interesting to the public.

Likewise, penalties for publishing the names of crime witnesses—aimed at preventing criminals from learning the witnesses' identities and then intimidating the witnesses—may keep third parties who know a witness from explaining to the public why they think the witness is unreliable and why the government is wrong to arrest people based on the witness's word. And laws restricting the publication of detailed information about security problems may keep people from explaining exactly why they think the government or industry isn't taking sufficient steps to deal with some such problem.

4. *Entertaining and satisfying curiosity*

Speech that describes how crimes are performed may also entertain readers. A detective story might depict a murder that's committed in a particularly ingenious, effective, and hard-to-detect way.²⁷ Nearly all the readers will just enjoy the book's ingeniousness, but a few may realize that it offers the solution to their marital troubles. (The precise details of the crime may be included either because they are themselves interesting, or for verisimilitude—many fiction writers try to make all the details accurate even if only a tiny fraction of readers would notice any errors.)

27. For examples of many novels that contain crime-facilitating speech, see Volokh, *supra* note 1, at 1123 n.115.

This may be true even for some of the crime-facilitating speech that people find the most menacing, such as the contract murder manual involved in *Rice v. Paladin Enterprises*. There were apparently thirteen thousand copies of the book sold, and I suspect that only a tiny fraction of them were really used by contract killers. Who were the remaining readers? Many were likely armchair warriors who found it entertaining to imagine themselves as daring mercenaries who are beyond the standards of normal morality.

Part of the fun of reading some novels is imagining yourself in the world that the book describes. People can get similar entertainment from factual works, including ones that are framed as “how-to” books, such as the travel guide *Lonely Planet: Antarctica*, magazines about romantic hobbies, the *Worst Case Scenario* series, and even some cookbooks—many readers of such books may want to imagine themselves as Antarctic travelers, survivors, or cooks, with no intention of acting on the fantasies. And people with grislier imaginations can be likewise entertained by books about how to pick locks, change your identity, or even kill people.

Other readers of crime-facilitating how-to manuals are probably just curious. Many nonfiction books are overwhelmingly read by people who have no practical need to know about a subject, whether it’s how planets were formed, who Jack the Ripper really was, or how Babe Ruth (or, for that matter, serial killer Ted Bundy) lived his life. Some people are probably likewise curious about how hit men try to get away with murder, or how bombs are made. And satisfying one’s curiosity this way may sometimes yield benefits later on—the information you learn might prove unexpectedly useful, in ways that are hard to predict.²⁸

This of course doesn’t resolve how highly we should value entertainment and satisfaction of curiosity, especially when we compare them against the danger that the book will facilitate murder; Part III.A.3 discusses this. For now, my point is simply that some crime-facilitating works do have some value as entertainment, whether because they’re framed as detective stories or because they satisfy readers’ curiosity or desire for vicarious thrills. It is therefore not

28. I’m speaking here specifically of the value provided by the crime-facilitating information in the book. The book as a whole can of course do more than entertain the reader and satisfy curiosity: For instance, a detective novel or a nonfiction biography of a criminal can enrich readers’ understanding of human nature, affect their moral judgments about criminality, and so on. But the crime-facilitating elements, such as the exact details about how some crime was committed or could be committed, are less likely to have such a generally enriching effect. Sometimes they may indeed be relevant to political debates, a matter I discussed in Parts I.B.2-3; but often they will simply entertain the reader and satisfy his curiosity.

correct to say that such works are useful only to facilitate crime,²⁹ or that the author's or publisher's purpose therefore must have been to facilitate crime.³⁰

5. *Self-expression*

Finally, crime-facilitating speech may be valuable to speakers as a means of expressing their views. A scientist or engineer may feel that speaking the truth about some matter is valuable in itself. People who strongly oppose a law may feel that explaining how the law can be circumvented can help them fully express the depth of their opposition, and can help them "engage in self-definition" by "defin[ing themselves] publicly in opposition" to the law. The same is true of people who strongly believe that all people should have the right to end their own lives if the lives have become unbearable, and who act on this belief by publicizing information about how to commit suicide. Even people who give their criminal friends information about how to more effectively and untraceably commit a crime, or tell them when the police are coming, might be expressing their loyalty, affection, or opposition to the law that the police are trying to enforce.

As with entertainment, it's not clear how much we should value such self-expression. Perhaps the harm caused by crime-facilitating speech is enough to justify restricting the speech despite its self-expressive value, or perhaps self-expressive value shouldn't count for First Amendment purposes.³¹ For now, I simply identify this as a possible source of First Amendment value.

C. *Dual-Use Materials*

We see, then, that crime-facilitating speech is a form of dual-use material, akin to guns, knives, videocassette recorders, alcohol, and the like. These materials can be used both in harmful ways—instructions and chemicals can equally be precursors to illegal bombs—and in legitimate ways; and it's usually impossible for the distributor to know whether a particular consumer will use the product harmfully or legally.

We'd like, if possible, to have the law block the harmful uses without interfering with the legitimate, valuable ones. Unfortunately, the obvious solution—outlaw the harmful use—will fail to stop many of the harmful uses, which tend to take place out of sight and are thus hard to identify, punish, and deter.

29. See, e.g., *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 254 (4th Cir. 1997) ("*Hit Man* . . . is so narrowly focused in its subject matter and presentation as to be effectively targeted exclusively to criminals."), and many more similar statements in *Rice*.

30. See, e.g., *id.* at 267.

31. See *infra* Part III.A.2 for a discussion of when in particular the speaker's interest in self-expression may have to yield.

We may therefore want to limit the distribution of the products, as well as their harmful use, since the distribution is usually easier to see and block; but prohibiting such distribution would prevent the valuable uses as well as harmful ones. Most legal rules related to dual-use products thus adopt intermediate positions that aim to minimize the harmful uses while maximizing the valuable ones, for instance by restricting certain forms of the product or certain ways of distributing it.

Any analogies we draw between dual-use speech and other dual-use materials will be at best imperfect, because speech, unlike most other dual-use items, is protected by the First Amendment. But recognizing that crime-facilitating speech is a dual-use product can help us avoid false analogies. For instance, doing something knowing that it will help someone commit a crime is usually seen as morally culpable. This assumption is sound enough as to single-use activity, for instance when someone personally helps a criminal make a bomb. But this principle doesn't apply to dual-use materials, for instance when someone sells chemicals or chemistry books to the public, knowing that the materials will help some buyers commit crimes but also help others do lawful things.

Likewise, as I argue in Part II.B of the unabridged article, strict scrutiny analysis may apply differently to restrictions on dual-use speech than to restrictions that focus only on speech that has a criminal purpose. And, as I'll argue in Part III.A.2, the case for restricting crime-facilitating speech is strongest when the speech ends up being single-use in practice—because there are nearly no legitimate uses for the particular content, or because the speech is said to people who the speaker knows will use it for criminal purposes—rather than dual-use.

II. CRIME-FACILITATING SPEECH AND EXISTING FIRST AMENDMENT LAW

As Justice Stevens recently noted, the Supreme Court has “not yet considered whether, and if so to what extent, the First Amendment protects” crime-facilitating speech; lower courts have confronted the issue on occasion, but haven't arrived at any settled rule. In Part II of the unabridged article (see footnote 1), I discuss the few Supreme Court cases that have briefly touched on the problem; I also explain why strict scrutiny, balancing, and the argument that crime-facilitating speech is sometimes conduct rather than speech provide no satisfactory answer here.

III. POSSIBLE DISTINCTIONS WITHIN THE CRIME-FACILITATING SPEECH CATEGORY

How can courts craft a crime-facilitating speech exception? Let's begin by identifying and evaluating the potential criteria that would distinguish protected crime-facilitating speech from the unprotected. These distinctions will be the

potential building blocks of any possible test; Part III.G will then make some suggestions about which blocks should be included.

A. Distinctions Based on Value of Speech

1. First Amendment constraints on measuring the value of speech

For more on this largely theoretical question, please see the unabridged article, cited in footnote 1.

2. Virtually no-value speech

a. Speech to particular people who are known to be criminals

Some speech is communicated entirely to particular people who the speaker knows will use it for criminal purposes. A burglar tells his friend how he can evade a particular security system. A lookout, or even a total stranger, tells criminals that the police are coming. Someone tells a particular criminal (whom he knows to be a criminal) that his line is tapped. A person tells another person how to make explosives or drugs, knowing that the listener is planning to use this information to commit a crime.

In all these examples, the speech has pretty much a solely crime-facilitating effect—it's really single-use speech rather than dual-use speech—and the speaker knows this or is at least reckless about this.³² In this respect, the speech is like sales of guns or bomb ingredients to people who the seller knows are likely to use the material in committing a crime.

Restricting such speech or conduct will, at least in some situations, make it somewhat harder for the listener or buyer to successfully commit the crime, and it will interfere very little with valuable uses of the speech or other materials. The speech doesn't contribute to political or scientific debates, provide innocent entertainment, or even satisfy law-abiding users' intellectual curiosity; its sole significant effect is to help criminals commit crimes.³³ It makes sense, I

32. If the speaker doesn't realize that the listener is a criminal who will likely use the speech for criminal purposes, then the speech is considerably less culpable; and punishing such innocently intended speech is likely to unduly deter valuable speech to law-abiding listeners. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

33. One can imagine some possible social value that might flow from the communication. For instance, if you tell someone who you think is a criminal that the police are coming, and it turns out that the person's behavior is really legal but just suspicious-looking, then your statement might inadvertently prevent an erroneous arrest. Even if the person you're warning is a criminal, he might have innocent friends standing nearby, so warning him might prevent the innocents from getting caught in a crossfire, or getting erroneously arrested. Nonetheless, these valuable uses seem extremely unlikely when someone knowingly conveys crime-facilitating information just to a person who wants to use it for criminal purposes, and thus seem too insubstantial to influence the analysis.

think, to treat the speech as having so little First Amendment value that it is constitutionally unprotected, much as how threats or false statements of fact are treated.

Moreover, such a judgment, if limited to this sort of single-use speech, would create a limited precedent that seems unlikely to support materially broader speech restrictions. The speech is not only harmful, but seems to have virtually no First Amendment value. It has been traditionally seen as punishable under the law of aiding and abetting or (more recently) criminal facilitation. It's spoken to only a few people who the speaker knows are criminals. It seems improbable that judges or citizens will see a narrow exception for this sort of speech as a justification for materially broader exceptions.

Speech within this category should be treated the same for constitutional purposes whether it's said with the *intent* that it facilitate crime, or merely with the *knowledge* that it's likely to do so. Say a man goes to a retired burglar friend of his, and asks him for advice on how to quickly disable a particular alarm, or open a particular safe; and say that the burglar replies, "Look, I don't want you to commit this crime—it's too dangerous, you should just retire like I did—and I don't want a cut of the proceeds; but I'll tell you because you're my friend and you're asking me to."

Strictly speaking, the retired burglar doesn't have the "conscious object . . . to cause" the crime, and is thus not acting with the intent that the crime be committed.³⁴ He may sincerely wish that his friend just give up the project; he may even have a selfish reason for that wish, because if the crime takes place, one of the criminals may be pressured into revealing the retired burglar's complicity. Nonetheless, the retired burglar's speech facilitates the crime just as much as if he wanted the crime to take place. It seems to be as constitutionally valueless, as much worth deterring, and as deserving of punishment as speech that purposefully facilitates crime.³⁵

Of course, if we think that some criminal or tortious conduct—for instance, illegal immigration, drugmaking, or copyright infringement—is actually laudable, and shouldn't be illegal at all, then we might view speech that helps particular people engage in such conduct as both harmless and valuable. But I don't think it's proper for courts to reject aiding and abetting or criminal facilitation liability on these grounds, and I'm quite sure that courts won't in fact reject such liability. Few judges would reason, I think, that selling marijuana is perfectly fine (though it's illegal and constitutionally unprotected), so that therefore a lookout for a marijuana dealer has a First Amendment right not to be punished for alerting the dealer that the police are coming.

34. See, e.g., MODEL PENAL CODE § 2.02(2)(a) (1962) (defining "intent" in this way).

35. For an explanation of why the speech shouldn't be unprotected if it's merely negligently crime-facilitating, see *supra* note 32.

Knowingly or even intentionally providing information that helps others commit minor crimes—speeding, illegal downloading of music, and the like—might not be worth punishing. This, though, should be reflected in decisions by prosecutors, or in legislative judgments (or possibly common-law decisions by judges) to limit some forms of aiding and abetting liability to more serious crimes, or at least to punish aiders of less serious crimes only when the aid is intentional.

Finally, I acknowledge that even single-use speech may be valuable as self-expression: Telling a criminal friend how to commit a crime, or telling him that the police are coming, may express loyalty and affection, and thus contribute to the speaker's self-fulfillment and self-definition. But it seems to me that speech stops being legitimate self-expression when the speaker knows that its only likely use is to help bring about crime.

Self-expression must be limited in some measure by a speaker's responsibility not to help bring about illegal conduct. When speech contributes to public debate as well as constituting self-expression, the speech may deserve protection despite its harmful effects. But when its value is solely self-expression, its contribution to the listener's crimes should strip it of its protection just as its coerciveness or deception would strip it of protection.

b. *Speech communicating facts that have very few lawful uses*

The preceding pages dealt with speech that has only harmful uses because of the known character of its *listeners*: The speaker is informing particular people, and the speaker knows those people are planning to use the information for criminal purposes. But there are also a few categories of speech that are likely to have virtually no noncriminal uses because of their *subject matter*.

Consider social security numbers and computer passwords. Publicly distributing such information is unlikely to facilitate any political activity (unlike, say, publicly distributing abortion providers' or boycott violators' names, which may facilitate lawful shunning and social pressure, or even their addresses, which may facilitate lawful residential picketing and parading). It's unlikely to contribute to scientific or business decisions (unlike, say, publicly distributing information about a computer security vulnerability). And unlike detective stories or even contract murder manuals, social security numbers and computer passwords are unlikely to have any entertainment value.³⁶

36. Even in these cases, there may be some conceivable legitimate uses. For instance, say that a newspaper or a Web log gets an e-mail that says, "I have discovered a security hole in system X that allowed me to get a large set of social security numbers. I'm alerting you to this so you can persuade the operators of X to fix the hole; I pass along a large set of the numbers and names to prove that the hole exists." By publishing some of the numbers and the names, the recipient can prove the existence of the problem, and thus more quickly persuade people to fix the problem. If people see their own names and social security numbers on the list, they'll know there's a problem. If they simply hear that someone claims that such a security hole exists, they may be more skeptical.

Still, these valuable uses would be extremely rare, and people can easily accomplish the same goal in a less harm-facilitating way simply by releasing only the first few digits or characters of the social security numbers (still coupled with the owners' names) or of the computer passwords. Restricting the publication of full social security numbers or passwords thus will not materially interfere with valuable speech. Such equally effective but less harmful alternative channels wouldn't be available for any of the other examples I describe: For instance, if you're trying to prove the existence of a security problem by describing the *prob-*

Moreover, because such purely crime-facilitating information tends to be specific information about particular people or places, restricting it might actually do some good, as Part III.A.3 below discusses in more detail. General knowledge, such as information about encryption or drugmaking, is very hard to effectively suppress, especially in the Internet age: Whatever the government may realistically do, some Web sites containing this information will likely remain. But specific details about particular people or computers are more likely to be initially known to only a few people. If you deter those people from publishing the information, then the information may well remain hidden.

Here, too, crime-facilitating speech is analogous to some crime-facilitating products. For example, some states that allow guns nonetheless forbid silencers, presumably because silencers are seen as having virtually no civilian purposes other than to make it easier to criminally shoot people without being caught. People view silencers as single-use devices; prohibiting them may help diminish crime, or make criminals easier to catch, without materially affecting any law-abiding behavior.

Likewise, if a product has no substantial uses other than to infringe copyrights or patents, then distributing it is legally actionable. Distribution of dual-use products is legal, because making it actionable would interfere with the substantial lawful uses as well as the infringing ones. But when a product has virtually no lawful uses, then there is little reason to allow it, and ample reason—the prevention of infringement—to prohibit it. The same sort of argument would apply to the crime-facilitating speech described here.

There are two major arguments in favor of protecting even these publications. The first is the risk that the category will be applied erroneously, or will stretch over time to cover material that it shouldn't cover. As I mentioned, even publishing others' passwords and social security numbers might have some theoretically possible law-abiding uses. I think these uses are pretty far-fetched; but once courts are allowed to find speech valueless on the ground that it has very few (rather than just no) law-abiding uses, the term "very few" could eventually broaden to cover more and more. If one thinks that this is likely to happen, or if one thinks that courts will often erroneously fail to see the valuable uses of truly dual-use speech, one might prefer to reject any distinction that asks whether speech has "virtually no" lawful uses.

Second, such a distinction would add to the set of reasons why a publication—not just speech to a few known criminals, but speech to the public—might be suppressed; and each new exception makes it easier to create still more exceptions in the future. Arguments for exceptions are often made through analogies, which may be imperfect but still sometimes persuasive. (My own argument above, for instance, uses the existence and propriety of the exceptions for threats and false statements of fact as an analogy supporting an ex-

lem rather than by showing the *fruits of exploiting it*, then describing half the problem isn't going to be proof enough that the problem exists. *See supra* note 26 and accompanying text.

ception for certain kinds of crime-facilitating speech.) As the exceptions increase, these arguments by analogy become easier to make.

This concern may be too speculative to carry much weight when the need for the exception seems strong, but it might help argue against exceptions that don't seem terribly valuable on their own. If the category of facts that have almost no lawful uses is indeed limited to others' social security numbers and computer passwords, then perhaps creating a First Amendment exception to cover such speech might provide too little immediate benefit to justify the potential long-term slippery slope cost.

Nonetheless, it seems to me that the benefits of this exception do exceed the potential costs. If crime-facilitating material really has virtually no legitimate uses, the case for allowing the law to suppress it seems quite strong.

3. *Low-value speech?*

Once we set aside the speech that has only, or nearly only, illegal uses, the remainder is genuinely dual-use: Some listeners will be enlightened or entertained by the information, while others will misuse it. Might some such enlightenment or entertainment be less constitutionally valuable, for instance (a) because it's just about science rather than politics, (b) because it's mere entertainment rather than political advocacy, (c) because it's on matters of purely "private concern" rather than of "public concern," (d) or because it's on matters of only modest public concern rather than of "unusual public concern"?

In Part III.A.3 of the unabridged article (cited in footnote 1), I discuss these questions in detail, and conclude the answer should generally be "no." I include below just one subsection of that Part, because in my experience people have found it to be the most important.

b. *General knowledge vs. particular incidents*

Some crime-facilitating speech communicates general knowledge—information about broadly applicable processes or products, such as how explosives are produced, how one can be a contract killer, or how an encryption algorithm can be broken. Other crime-facilitating speech communicates details about particular incidents, such as a witness's name, or the fact that certain library records have been subpoenaed.

Some might argue that the particular information is materially less valuable than the general, precisely because the particular discusses only one specific incident. But the Court has not taken this view. A wide range of cases—such as libel cases, cases dealing with criticism of judges' performance in particular cases, cases dealing with the publication of the names of sex crime victims, and more—have involved statements about particular incidents and often particular people, rather than general assertions about politics or morality. All those cases

have treated speech about particular incidents as being no less protected than speech about general ideas; and they have been right on this, for three reasons.

(1) People's judgment about general problems is deeply influenced by specific examples; and any side that is barred from giving concrete, detailed examples will thus be seriously handicapped in public debate. Generalities alone rarely persuade people—to be sound and persuasive, an argument typically has to rest both on a general assertion and on specific examples. To decide whether library borrowing records should be subject to subpoena, for instance, people will often need to know just how such subpoenas are being used. Statistical summaries (especially ones that can't be verified by the media, because it's a crime to reveal the subpoena to the media) won't be enough.

Likewise, people are much less likely to be persuaded by accounts that omit names, places, and details of the investigation. People are rightly skeptical of accounts that lack corroborating detail—saying “trust me” is a good way to get people not to trust you, especially when, as now, people doubt the media as much as they do other institutions.³⁷

(2) Speech about particular incidents is often needed to get justice in those incidents, and to deter future abuses. One important limit on government power is its targets' ability to publicly denounce its exercise. If a librarian who is served with a subpoena can't publicize the subpoena, and can't explain in detail how he thinks this subpoena unnecessarily interferes with patrons' and librarians' privacy and freedom, then it will be more likely that such a subpoena may stand even if it's illegal or unduly intrusive.

Likewise, if a newspaper may not publish the names of crime witnesses, then it's less likely that others who may know that the witnesses are unreliable will come forward, and tell their story either to the court or to the journalists. Justice in general can only be done by working to get the right results in each case in particular. And public speech about the concrete details of the particular cases is often needed to find the truth in those cases.

(3) Even temporary restrictions on publishing specific information raise serious First Amendment problems, because the value of speech can be lost even if the speech is just delayed, rather than prohibited altogether—this is why the Court has generally rejected proposals to suppress speech during trials, even if the speech were to be freely allowed after the trial. The same should apply to,

37. Newspapers and other speakers sometimes do use anonymous reports in their stories, because of other constraints (such as promises to sources), but that's certainly not the optimal means of persuading a skeptical public.

Some readers may trust the newspaper that says “Trust us” more if it says “Trust us; we'd give the supporting facts, but the law prohibits us from doing so.” But other readers might reasonably fear that the newspaper actually doesn't have all the facts—or they might fear that the newspaper thinks it has the facts, but that those facts are less accurate or more ambiguous than the newspaper thinks. There's no substitute for seeing the underlying facts, and knowing that other people, who may know more about the subject than you do, see the facts. Anything else will be inherently less credible.

for instance, rules that bar revealing witnesses' identities before they testify, or that bar revealing subpoenas before the investigation is over.

Often, if the speech is delayed, any harm the speech seeks to avoid may become hard to remedy: Many people's personal reading habits might be wrongly revealed to the government by an overbroad subpoena, or a person may be wrongly convicted and the conviction may be hard to overturn even if new evidence is revealed after trial. Moreover, the public is often less interested in discussing alleged past wrongs than it is in confronting supposed injustice in a prosecution or an investigation that's now taking place. Just as any side of the debate that can't produce concrete details is greatly handicapped, so is any side that can't bring its evidence before the public when the evidence is most timely.

But while specific information about particular incidents ought not be distinguished from general knowledge on grounds of value, it is indeed different in another way: Trying to restrict the spread of some such specific information may be less futile than trying to restrict general knowledge. General knowledge, such as drugmaking or bomb-making information, is likely to already be known to many people, and published in many places (including foreign places that are hard for U.S. law to reach). People will therefore probably be able to find it somewhere, especially on the Internet, with only modest effort. If the knowledge is available on five sites rather than fifty, that will provide little help to law enforcement.

On the other hand, any particular piece of specific information—such as the existence of a particular subpoena or the password to a particular computer system—is less likely to be broadly available at the outset. If the law can reduce the amount of such information that's posted, then fewer investigations will be compromised and fewer computer systems will be broken into; it's better that there be fifty incidents of computer system passwords being revealed than five hundred. So to the extent that the futility of a speech restriction cuts against its constitutionality, restrictions on general knowledge are less defensible than restrictions on specific information about particular people or places.

B. Distinctions Based on the Speaker's Mens Rea

1. Focusing on knowledge that speech will likely facilitate crime or recklessness about this possibility

Some First Amendment doctrines, most famously libel law, seek to avoid First Amendment problems partly by distinguishing reasonable or even negligent mistakes from situations where the speaker knows the speech will cause harm or is reckless about this possibility. Would it make sense for First Amendment law to likewise treat crime-facilitating speech as unprotected if the

speaker knows that the speech will help facilitate crime, or perhaps if he is reckless about that possibility³⁸

Indeed, knowingly doing things that help people commit crimes (for instance, lending a criminal a gun knowing that he will use it to rob someone) is often punishable. In some jurisdictions, it may be treated as aiding and abetting; in others, as the special crime of criminal facilitation (which may also cover reckless conduct). In most jurisdictions, it's considered a civilly actionable tort. Similarly, knowing (and likely reckless) distribution of falsehood, obscenity, and child pornography is constitutionally unprotected.

Under this knowledge-or-recklessness test, most of the speakers mentioned in the Introduction would probably be punishable, because they generally know that some of their readers will likely misuse the information that the speaker conveys. For instance, a thoughtful journalist who writes a newspaper article about a pirate Web site would have to know that some of his many thousands of readers will probably find the site and will then use it to infringe copyright. Even if the journalist doesn't subjectively know this, that will quickly change once a copyright owner notifies the journalist and the publisher that the article is indeed helping people infringe. Future articles will thus be published knowing the likely crime-facilitating effect; and if the article is on the newspaper's Web site, then the publisher will be continuing to distribute the article knowing its likely effects.

Likewise for authors and publishers of prominent chemistry reference books that discuss explosives. The authors and publishers probably know that some criminals will likely misuse their books; and even if they don't, they will know it once the police inform them that the book was found in a bomb-maker's apartment.³⁹

38. Consider, for instance, the cases cited in Volokh, *supra* note 1, at nn.18 & 138-139 (allowing liability for, among other things, disseminating information about bomb-making when the speaker knows that the information "would be used in the furtherance of a civil disorder," disseminating information that the speaker knows, or perhaps even should know, could be used to infringe copyright, or publishing the names of witnesses when the speaker knows that criminals could use the information to kill or intimidate the witnesses); sources cited in *id.* nn.47 & 294 (urging civil liability for certain kinds of crime-facilitating speech based on knowledge or on recklessness).

39. Of course, a publisher may not know for certain that some readers will misuse the books; it's impossible to predict the future with such confidence. But when one is distributing a work to many thousands (or, for some newspaper articles, millions) of readers, and the work is capable of facilitating crime, surely a thoughtful author and publisher have to know that there's a high probability—which is all we can say as to most predictions—that at least a few readers will indeed use the work for criminal purposes. And though the publisher and author will rarely know which particular person will misuse the information, "knowledge" requirements in criminal law and First Amendment law generally don't require such specific knowledge: Someone who bombs a building knowing that there are people in it is guilty of knowingly killing the people even if he didn't know their precise identities; and someone who knowingly defames a person is liable for business that the victim loses as a result of the defamation even if the speaker didn't know precisely who will stop doing business with the

Yet it's a mistake to analogize knowingly producing harm through dual-use speech (such as publishing chemistry books) to knowingly producing harm through single-use speech, single-use products, or single-effect conduct. Such single-use or single-effect behavior involves a strong case for liability precisely because the speaker or actor knows his conduct will produce harm but no (or nearly no) good. That's true if he gives a gun to a particular person who he knows will use it to commit crime (which is analogous to the no-value one-to-one speech discussed in Part III.A.2), or if he broadly distributes false statements of fact, which are generally seen as lacking in constitutional value (analogous to the no-value public speech discussed in Part III.A.2).

If, however, a speaker is distributing material that has valuable uses as well as harmful ones, and he has no way of limiting his audience just to the good users—the classic dual-use product scenario—then the case for restricting his actions is much weaker. For instance, a distributor who sells alcohol to a particular minor, knowing that he's a minor, is breaking the law. A manufacturer who sells alcohol to distributors in a college town, while being quite certain that some substantial fraction of the alcohol will fall into the hands of minors, is acting lawfully.

Likewise, knowingly helping a particular person infringe copyright is culpable, and constitutes contributory infringement. Knowingly selling VCRs is not, even if you know that millions of people will use them to infringe. Under the “substantial noninfringing uses” prong of the contributory copyright infringement test, product distributors can only be held liable if the product is nearly single-use (because nearly all of its uses are infringing) rather than dual-use. Where speech is concerned, the First Amendment should likewise protect dual-use speech from liability even when the speaker knows of the likely harmful uses as well as the likely valuable ones.

Of course, knowingly distributing some dual-use products is illegal, because the harmful use is seen as so harmful that it justifies restricting the valuable use. Recreational drugs (the valuable use of which is mostly entertainment) are a classic example. Guns, in the view of some, should be another.

One may likewise argue that knowingly crime-facilitating speech should be unprotected, because it can cause such serious harm: bombings, killings of crime witnesses, computer security violations that may cause millions or billions of dollars in damage, and the like. Moreover, the argument would go, restricting crime-facilitating speech will injure discussion about public affairs less than restricting crime-advocating speech would—people could still express whatever political ideas they might like, just without using the specific factual details.

Such restrictions may interfere more seriously with scientific speech, whether about chemistry, computer security, drugs, criminology, or cryptogra-

victim.

phy, since such speech especially requires factual detail. But, the argument would go, the government is unlikely to regulate such speech more than necessary, because legislators won't want to stifle useful and economically valuable technological innovation. Chemistry textbooks on explosives, publications that name boycott violators or abortion providers, and detective novels that describe nonobvious but effective ways to commit crime would thus be stripped of First Amendment protection—the decision about whether to allow them would be left to legislatures.

I think, though, that creating such a broad new exception would be a mistake. As Part I.B described, dual-use crime-facilitating speech can be highly relevant to important public debates, and few public policy debates are resolved by abstractions. To be persuaded, people often need concrete examples that are rich with detail; and requiring speakers on certain topics to omit important details will systematically undermine the credibility of their arguments.

“Mandatory ballistic fingerprinting of guns won't work” isn't enough to make a persuasive argument. “Mandatory ballistic fingerprinting won't work because it's easy to change the gun's fingerprint; I'm not allowed to explain why it's easy, but trust me on it” isn't enough. Often only concrete details—a description of the supposedly easy techniques for changing the fingerprint—can really make the argument effective, and can rebut the government's assertions defending the proposed program. And this is true even if the details don't themselves mean much to the typical reader: Once the details are published, lay readers will be able to rely on further information brought forward by more knowledgeable readers, or by experts that newspapers can call on to evaluate the claims.

Also, as Part I.B.3 discusses, the ability to communicate details may be a check on potential government misconduct. Bans on publishing information about subpoenas, wiretaps, witnesses, or security flaws, for instance, can prevent people from blowing the whistle on what they see as government misbehavior. It is indeed unfortunately true that if librarians can publicize subpoenas for library records, the criminals who are being investigated may learn of the subpoenas and flee. But if librarians can't publicize such subpoenas, even if they think that the subpoenas are overbroad and unjustified, then the government will have more of an incentive to issue subpoenas that are too broad or even illegal. Here, as in other areas, the First Amendment may require us to tolerate some risks of harm—even serious harm—in order to preserve people's ability to effectively debate policy and science.

A broad exception for knowingly crime-facilitating speech would also, I think, set a precedent for other broad exceptions in the future. The exception, after all, would empower the government to restrict speech that concededly has serious value (unlike, for instance, false statements of fact, fighting words, or

even obscenity) and is often connected to major political debates.⁴⁰ It would empower the government to completely ban the publication of certain facts, and wouldn't leave the speaker with any legal means to communicate those facts. And it would let the government do so in a wide variety of cases, not just those involving extraordinarily dangerous speech such as the publication of instructions on how to make H-bombs or biological weapons.⁴¹ That's quite a step beyond current First Amendment law, as I hope some of the examples in the Introduction illustrate.

Moreover, even the existing First Amendment exceptions, which are comparatively narrow, are already often used to argue for broader restraints. Each new exception strengthens those arguments—and an exception for all knowingly or recklessly crime-facilitating speech, including speech that is potentially an important contribution to political debate among law-abiding voters, would strengthen them still further. In a legal system built on analogy and precedent, broad new exceptions can have influence considerably beyond their literal boundaries.

2. *Focusing on purpose to facilitate crime*

So the speakers and publishers of most crime-facilitating speech likely know that it may help some readers commit crime, or are at least reckless about the possibility. Punishing all such knowingly or recklessly crime-facilitating speech would punish a wide range of speech that, I suspect, most courts and commentators would agree should remain protected. But what about a distinction, endorsed by the Justice Department and leading courts and commentators, based on intent (or “purpose,” generally a synonym for intent)—on whether the speaker has as one's “conscious object . . . to cause such a result,” rather than just knowing that the result may take place?

Most legal rules don't actually distinguish intent and knowledge (or recklessness), even when they claim to require “intent.” Murder, for instance, is sometimes thought of as intentional killing, but it actually encompasses knowing killing and reckless killing as well. Blowing up a building that one knows to be occupied is murder even when one's sole purpose was just to destroy the building, and one sincerely regrets the accompanying loss of life.

40. The incitement exception does let the government restrict speech that's connected to major political debates and that sometimes has serious value (for instance, when the speech both incites imminent illegal conduct but also powerfully criticizes the current legal system). But the imminence requirement has narrowed the incitement exception dramatically; crime-advocating ideas may still be communicated, except in unusual situations such as the speech to an angry mob. An exception for knowingly crime-facilitating speech would be considerably broader than this narrow incitement exception.

41. For more on the possibility of a narrow exception for knowing publication of material that facilitates extraordinary harms, see *infra* Part III.D.1.

Similarly, the mens rea component of the intentional infliction of emotional distress tort can usually be satisfied by a showing of recklessness or knowledge and not just intent. Likewise, so-called intentional torts generally require a mens rea either of intent or of knowledge. Concepts such as “constructive intent” or “general intent,” which generally don’t require a finding of intent in the sense of a “conscious object . . . to cause [a particular] result,” further muddy the intent/knowledge distinction, and risk leading people into confusion whenever the distinction does become important.

Yet some legal rules do indeed distinguish intent to cause a certain effect from mere knowledge that one’s actions will yield that effect. For instance, if a doctor knowingly touches a fifteen-year-old girl’s genitals during a routine physical examination, the doctor isn’t guilty of a crime simply because he knows that either he or the girl will get aroused as a result. But if he does so with the *intent* of sexually arousing himself or the girl, in some states he may be guilty of child molestation.

Likewise, if your son comes to the country in wartime as an agent of the enemy, and you help him simply because you love him, then you’re not intentionally giving aid and comfort to the enemy—and thus not committing treason—even if you know your conduct will help the enemy. But if you help your son partly because you want to help the other side, then you are acting intentionally and not just knowingly, and are guilty of treason. (This is the distinction the Court drew in *Haupt v. United States*, a World War II case, and it’s a staple of modern treason law.) To quote Justice Holmes in *Abrams v. United States*,

[T]he word “intent” as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. . . . But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind. . . .

A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime [under a statute limited to statements made “with intent . . . to cripple or hinder the United States in the prosecution of the war”].

Might courts follow this exact usage of “intent”—meaning purpose, as opposed to mere knowledge—and draw a useful distinction between dual-use speech distributed with the purpose of promoting the illegal use, and dual-use material distributed without such a purpose?

a. *Crime-facilitating speech and purpose*

Let's begin analyzing this question by considering what the possible purposes behind crime-facilitating speech might be.

(1) Some speakers do have the "conscious object" or the "aim" of producing crime: For instance, some people who write about how to effectively resist arrest at sit-ins, engage in sabotage, or make bombs may do so precisely to help people commit those crimes. The deeper motive in such cases is generally ideological, at least setting aside speech said to a few confederates in a criminal scheme. Speakers rarely want unknown strangers to commit a crime unless the crime furthers the speaker's political agenda.

(2) Others who communicate dual-use information may intend to facilitate the lawful uses of the sort that Part I.B described. For instance, they may want to concretely show how the government is overusing wiretaps, by revealing the existence of a particular wiretap. They may want to show the futility of drug laws, by explaining how easy it is to grow marijuana. Or they may want to entertain, by writing a novel in which the criminal commits murder in a hard-to-detect way.

(3) Other speakers may be motivated by a desire for profit, without any intention of facilitating crime. The speaker may be aware that he's making money by helping criminals, but he might sincerely prefer that no one act on his speech.

The contract murder manual case is probably a good example: If you asked the publisher and the writer, "What is your purpose in publishing this book?" they'd probably sincerely tell you, "To make money." If you asked them, "Is your purpose to help people commit murder?" they'd sincerely say, "Most of our readers are armchair warriors, who just read this for entertainment; if we had our choice, we'd prefer that none of them use this book to kill someone, because if they do, we might get into legal trouble."

Perhaps this intention to make money, knowing that some of the money will come from criminals, is unworthy. But "when words are used exactly," the scenario described in the preceding paragraph does not involve speech purposefully said to facilitate crime. If crime-facilitating speech doctrine is set up to distinguish dual-use speech said with the intent to facilitate crime from dual-use speech said merely with knowledge that it will facilitate crime (as well as the knowledge that it will have other, more valuable, effects), the profit-seeking scenario falls on the "mere knowledge" side of the line.

In the *Rice v. Paladin Enterprises* litigation, the defendants stipulated for purposes of their motion to dismiss that they intended to facilitate crime, but that was done simply because they couldn't debate the facts, including their mental state, at that stage of the litigation. In reality, there was little practical or ideological reason for them to intend to help criminals (as opposed to merely knowing that they were helping criminals).

(4) Still other speakers may be motivated solely by a desire to speak, or to fight speech suppression, rather than by an intention to help people commit crimes or torts.⁴² A journalist who publishes information about a secret subpoena might do so only because he believes that the public should know what the government is doing, and that all attempts to restrict publication of facts should be resisted.

Some people who posted information on decrypting encrypted DVDs, for instance, likely did so because they wanted people to use this information. But after the first attempts to take down these sites, others put up the code on their own sites, seemingly intending only to frustrate what they saw as improper speech suppression—many such “mirror sites” are put up precisely with this intention. Still others put up crime-facilitating material because it was the subject of a noted court case, reasoning that people should be entitled to see for themselves what the case was about. Again, while the mirror site operators knew that their posting was likely to help infringers, that apparently wasn’t their intention.

(5) Some speakers may be motivated by a desire to help the criminal, though not necessarily to facilitate the crime. That was Haupt’s defense in *Haupt v. United States*—he sheltered his son because of parental love, not because he wanted the son’s sabotage plans to be successful. The Court acknowledged that such a motivation does *not* qualify as an intention to assist the crime.

Likewise, consider the burglar who asks a friend for information on how to more effectively break into a building (or a computer system). “Don’t do it,” the friend at first says, “it’s too dangerous”; but then the friend relents and provides the information, either from friendship or from a desire to get a flat sum of money up front (as opposed to a share of the proceeds). The advisor’s goal is not to help the burglary take place: The advisor would actually prefer that the burglar abandon his plans, because that would be safer for the advisor himself. Thus, the advisor isn’t intending to facilitate crime with his advice, though he knows he is facilitating the crime.

42. See, e.g., Laura Blumenfeld, *Dissertation Could Be Security Threat*, WASH. POST, July 8, 2003, at A1:

Toward the other end of the free speech spectrum are such people as John Young, a New York architect who created a Web site with a friend, featuring aerial pictures of nuclear weapons storage areas, military bases, ports, dams and secret government bunkers, along with driving directions from Mapquest.com. He has been contacted by the FBI, he said, but the site is still up.

“It gives us a great thrill,” Young said. “If it’s banned, it should be published. We like defying authority as a matter of principle.”

This is a pretty irresponsible intention, I think, at least in this situation—but it is not the same as an intention to facilitate harmful conduct (though it may show a knowledge that the site will facilitate harmful conduct). The site is at <http://eyeball-series.org/>; I found it through a simple Google search.

We see, then, several kinds of motivations, but only the first actually fits the definition of “intent” or “purpose,” as opposed to “knowledge” (at least when “intent” is used precisely and narrowly, which it would have to be if the law is indeed to distinguish intent from knowledge). Some of the other motivations may well be unworthy. But if they are to be punished, they would be punished despite the absence of intent, not because of its presence.

This list also shows that the presumption that “each person intends the natural consequences of his actions” is generally misplaced here. This presumption causes few problems when it’s applied to most crimes and torts, for which a mens rea of recklessness or knowledge usually suffices: It makes sense to presume that each person knows the natural consequences of his actions (the loose usage of “intent” to which Justice Holmes pointed). But when the law really aims to distinguish intent from mere knowledge, and the prohibited conduct involves dual-use materials, the presumption is not apt.

As the above examples show, people often do things that they know will bring about certain results even when those results are not their object or aim. People who distribute dual-use items may know that they’re facilitating both harmful and valuable uses, but may intend only the valuable use—or, as categories three through five above show, may intend something else altogether. If one thinks the presumption ought to be used in crime-facilitating speech cases, then one must be arguing that those cases should require a mens rea of either knowledge or intent, and not just of intent.

b. Difficulties proving purpose, and dangers of guessing at purpose

So most speakers of crime-facilitating speech will know that the speech may facilitate crime, but relatively few will clearly intend this. For many speakers, their true mental state will be hard to determine, because their words may be equally consistent with intention to facilitate crime and with mere knowledge.

This means that any conclusion about the speaker’s purpose will usually just be a guess. There will often be several plausible explanations for just what the speaker wanted—to push an ideology, to convey useful information, to sell more books, to titillate readers by being on the edge of what is permitted, and more. The legal system generally avoids having to disentangle these possible motives, because most crimes and torts (such as homicide or intentional infliction of emotional distress) require only knowledge or even just recklessness, rather than purpose. But when the law really requires a mens rea of purpose, and protects speech said with knowledge of its likely bad consequences but punishes speech said with a purpose to bring about those consequences, decisionmaking necessarily requires a good deal more conjecture.⁴³

43. Purpose tests may be familiar from some other contexts, such as burglary (which is

And this conjecture will often be influenced by our normal tendency to assume the best motives among those we agree with, and the worst among those we disagree with. This may have taken place in some of the World War I anti-war speech cases: Eugene Debs's speech condemning the draft, for instance, didn't clearly call on people to violate the draft law; I suspect his conviction stemmed partly from some jurors' assumption that socialists are a suspicious, disloyal, un-American sort, whose ambiguous words generally hide an intent to promote all sorts of illegal conduct.

Even if judges, jurors, and prosecutors try to set aside their prejudices and look instead to objective evidence, an intent test will tend to deter ideological advocacy, and not just intentionally crime-facilitating speech. The most reliable objective evidence of speakers' intentions is often their past political statements and affiliations. If the author of an article on infringing Web sites has in the past written that copyright is an immoral restraint on liberty, and that free copying helps advance knowledge, then this past work is evidence that he wrote the new article with the intent to help people infringe. The same is true if the author of an article on how marijuana is grown is active in the medical marijuana movement.⁴⁴ But if the authors are apolitical, or have publicly supported copy-

usually defined as breaking and entering with the intent to commit a crime); but their administrability in such areas doesn't mean they would equally work as to crime-facilitating speech. Burglary, for instance, requires a purpose *to engage in a further act*, rather than to bring about a consequence. Because we generally have control over our own actions, knowing that we will do something means that we have the intention of doing it—it's hard to imagine a burglar who knows that he will commit theft after he breaks into a building, but doesn't intend to commit theft. Juries in burglary cases thus aren't generally called on to distinguish breaking and entering with the *purpose* to commit a felony from breaking and entering with the *knowledge* that one will commit a felony, even though burglary requires a *mens rea* of purpose.

On the other hand, we often don't have control over all the consequences of our actions, and aren't able to accomplish some consequences without regrettably causing others. Thus, knowing that some consequence will result (for instance, that our speech will help others commit crime) does not necessarily equal intending that the consequence will result; and if bans on crime-facilitating speech turn on an intent to facilitate crime, juries will indeed have to draw lines between knowing facilitation and intentional facilitation. *See also infra* note 48 (discussing other purpose-based crimes, such as attempt or conspiracy).

44. *Rice v. Paladin Enterprises*, 128 F.3d 233, 265 (4th Cir. 1997), defended its holding by saying that there will be very few works that would be punishable under the court's test, which required intent to facilitate crime: "[T]here will almost never be evidence proffered from which a jury even could reasonably conclude that the producer or publisher possessed the actual intent to assist criminal activity. In only the rarest case . . . will there be evidence extraneous to the speech itself which would support a finding of the requisite intent." Likewise, the court said, "[n]ews reporting . . . could never serve as a basis for aiding and abetting liability consistent with the First Amendment," because "[i]t will be self-evident . . . that neither the intent of the reporter nor the purpose of the report is to facilitate [crime] . . . but, rather, merely to report on the particular event, and thereby to inform the public." *Id.* at 266.

But those statements are mistaken: If the author or the publisher has in the past taken political stands supporting the violation of a particular law, the jury could quite reasonably

right law or drug law, then that's evidence that they intended simply to do their jobs as reporters or scholars.

Considering people's past statements as evidence of their intentions is quite rational, and not itself unconstitutional or contrary to the rules of evidence.⁴⁵ The inferences in the preceding paragraph make sense, and are probably the most reliable way to determine the speaker's true intentions. Where intent is an element of the offense, such evidence is often needed. For instance, in *Haupt v. United States*, where Haupt's treason prosecution rested on the theory that he helped his son (a Nazi saboteur) with the intention of aiding the Nazis and not just from "parental solicitude," the Court stressed that the jury properly considered Haupt's past statements "that after the war he intended to return to Germany, that the United States was going to be defeated, that he would never permit his boy to join the American Army, that he would kill his son before he would send him to fight Germany, and others to the same effect.

Likewise, in *United States v. Pelley*, a World War II prosecution for spreading false reports with the intent to interfere with the war effort, the government relied, among other things, on Pelley's pro-German statements in a 1936 third-party presidential campaign, and on "his genuine admiration of the Hitler regime." Likewise, in hate crimes prosecutions, evidence of a person's past racist statements may be introduced to show that he intentionally attacked someone because of the victim's race, rather than for other reasons.

But the inferences are imperfect. The anticopyright or pro-medical-marijuana reporter may genuinely oppose illegal conduct at the same time that he opposes the underlying law: He may be writing his article simply because he finds the subject matter interesting and thinks readers ought to know more about how the law is violated, perhaps because this will show them that the law needs to be changed. And if the factfinder's inference is indeed mistaken, then the error is particularly troublesome, because it involves a person's being convicted because of his political beliefs, and not because of his actual intention to help people commit crimes.

(even if perhaps incorrectly) infer that the current statement—including a news report—was intended to help some readers commit crime. If Haupt could be convicted of treason based on his past statements about the Nazis (see the next paragraph in the text), so the author of the article on infringing sites or on how marijuana is grown could be convicted of aiding and abetting based on his past statements about the evils of copyright law or marijuana law.

45. As the cases discussed in the text show, intent is commonly proved by a person's past statements; and even if the statements are treated as character evidence, they would be admissible because character evidence may be used to show intent. *See, e.g.*, FED. R. EVID. 404(b); *United States v. Franklin*, 704 F.2d 1183 (10th Cir. 1983) (allowing the admission of prior racist acts, coupled with the defendant's statement explaining their racial motivation, as evidence of racist motive in a subsequent case). And because the statements are indeed powerful evidence of motivation, they would be admissible despite the risk that they may prejudice the jury against a defendant; evidence law generally allows the exclusion of such statements only when "its probative value is *substantially outweighed* by the danger of unfair prejudice." FED. R. EVID. 403 (emphasis added).

For all these reasons, an intent test tends to deter speakers who fear that they might be assumed to have bad intentions. Say you are an outspoken supporter of legalizing some drug, because you think it can help people overcome their psychiatric problems (some indeed say this about Ecstasy). Would you feel safe writing an article describing how easily people can illegally make the drug, and using that as an argument for why it's pointless to keep the drug illegal, when you know that your past praise of the drug might persuade a jury that the article is really intended to facilitate crime?⁴⁶

Likewise, say that you often write about the way drugs are made, perhaps because you're a biochemist or a drug policy expert. Would you feel safe publicly announcing that you also think drugs should be legal and people should use them, given that you know such speech could be used as evidence if you are prosecuted or sued for your writings on drugmaking?⁴⁷ More likely, if you're the drug legalization supporter, you'd be reluctant to write the article about drug manufacturing; and if you're the biochemist, you'd be reluctant to write the article favoring legalization. There would be just too much of a chance that the two pieces put together could get you sued or imprisoned.

Moreover, this deterrent effect would likely be greater than the similar effect of hate crimes laws or treason laws. As the Court pointed out when upholding a hate crime law, it seems unlikely that "a citizen [would] suppress[] his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits . . . [an] offense against person or property [more serious than a minor misdemeanor]." Few of us plan on committing such offenses, and we can largely avoid any deterrence of our speech simply by obeying the other laws.⁴⁸

If, however, the purpose-based law restricts not conduct, but speech, its deterrent effect on protected speech would be considerably greater. Citizens might well suppress their pro-drug legalization beliefs for fear that evidence of

46. Even if you stress in your article that you don't want readers to violate the law, but are giving the information only to support your argument for changing the law, the jury may well conclude (even if wrongly) that you're insincere.

47. Note that in these situations, the deterrent effects that I describe may operate with special strength. The hypothetical speaker is no hothead or fool, who may think little about legal risk. He's a scholar, an educated, thoughtful, reflective person with a good deal to lose from a criminal conviction or even a criminal prosecution, and time to consider whether publishing is safe or dangerous. He may thus be especially likely to rationally fear the law's deterrent effect—even though the same attributes (his thoughtfulness and rationality) may make his speech especially valuable to public debate.

48. Moreover, for other crimes that require intent, such as attempt or conspiracy, there'll often be powerful corroborating evidence of intent other than the defendant's past political statements—for instance, the defendant's getting a share of the crime's proceeds, or the defendant's having taken physical steps that strongly point towards the defendant's purpose being to commit a crime. Proof that someone is involved in a conspiracy to distribute marijuana will rarely rest on the person's past promarijuana statements. But when the crime itself consists solely of speech, the defendant's political opinions will often be the strongest evidence of his purpose.

such beliefs will be introduced against them at trial if they publish information about how drugs are made—especially if discussing drugmaking is part of their job or academic mission.

These concerns about the difficulty of proving intent, and the risk of deterring speech that might be used as evidence of intent, haven't led the Supreme Court to entirely avoid intent inquiries. Most prominently, for instance, modern incitement law retains the inquiry into whether the speaker intended to incite crime. But in most cases, any serious inquiry into intent is made unnecessary by the requirement that the speech be intended to and likely to incite *imminent* crime; it is this, I think, that has kept the incitement exception narrow. There will rarely be enough evidence to create a jury question on whether a speaker was intending to incite imminent crime.

Had the imminence requirement not been part of the test, though—had the test been simply intent plus likelihood—a jury could often plausibly decide that a speaker, especially a speaker known for hostility to a particular law, was intending to persuade people to violate the law at some future time. Concerned about this, many speakers would avoid any statements to which a jury might eventually impute an improper intent.⁴⁹ And to the extent that incitement might be civilly actionable (for instance, in a lawsuit by the victims of the allegedly incited crime), the jury wouldn't even have to find this improper intent beyond a reasonable doubt, but only guess at it by a preponderance of the evidence or at most by clear and convincing evidence. This is in fact one reason the intent-plus-likelihood test developed in *Schenck v. United States* and *Debs v. United States* was criticized, and perhaps one reason that the Court rejected it in favor of the *Brandenburg v. Ohio* intent-plus-imminence-plus-likelihood test.

The risk of jury errors in determining purpose likewise led the Supreme Court to hold that liability for defamation and for infliction of emotional distress may not be premised only on hateful motivations. Before 1964, many states imposed defamation liability whenever the speaker was motivated by “ill will” or “hatred” rather than “good motives.” But the Court rejected this approach, reasoning that “[d]ebate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred,” especially since “[i]n the case of charges against a popular political figure . . . it may be almost impossible to show freedom from ill-will or selfish political motives.” The same risk, and the same inhibition of public debate, appears with crime-facilitating speech: Speakers who are genuinely not intend-

49. Say, for instance, that Congress enacts a statute barring speech that's intended to and likely to lead to draft evasion or to interfere with war production. Would people then feel free to criticize the war even if they do this with the purest of intentions? Or will they be reluctant to speak, for fear that juries or judges would conclude, as did the judges in *United States v. Pelley*, 132 F.2d 170, 177 (7th Cir. 1942), that “[n]o loyal citizen, in time of war, forecasts and assumes doom and defeat . . . when his fellow citizens are battling in a war for their country's existence, except with an intent to retard their patriotic ardor in a cause approved by the Congress and the citizenry”?

ing to facilitate crime might nonetheless be deterred by the reasonable fear that a jury will find the contrary.

c. Is intentional crime facilitation meaningfully different from knowing crime facilitation?

I have argued so far that intentionally and knowingly/recklessly crime-facilitating speech are hard to distinguish in practice. But they are also similar in the harm they inflict, and in the value they may nonetheless have.

Consider two newspaper reporters. Both publish articles about a secret subpoena of library records; the articles criticize the practice of subpoenaing such records. Both know that the articles might help the target of the subpoena evade liability. The first reporter publishes his article with genuine regret about its being potentially crime-facilitating. The second reporter secretly wants the article to stymie the investigation of the target: This reporter thinks no one should be prosecuted even in part based on what he has read, and hopes that if enough such subpoenas are publicized and enough prosecutions are frustrated, the government will stop looking at library records.

Is there a reason to treat the two reporters differently? Both articles facilitate crime. Both convey valuable information to readers. The second reporter's bad motivation doesn't decrease that value or increase the harm, which suggests that this bad motivation ought not strip the speech of protection.

The Court has, for instance, rejected the theory that statements about public figures lose protection because the speaker was motivated by hatred and an intention to harm the target: "[E]ven if [the speaker] did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." Likewise, the Court has held that lobbying or public advocacy is protected against antitrust liability even if the speaker's "sole purpose" was anticompetitive: "The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so," partly because even people who are trying to restrict competition may be "a valuable source of information." The ability of dual-use crime-facilitating speech to contribute to the exchange of facts and ideas is likewise independent of whether it's motivated by a bad purpose.

Similarly, say that the intentionally crime-facilitating article is posted on some Web sites, the government tries to get the site operators to take down the articles, and the operators refuse. The site operators—who might be the publishers for whom the reporter works, or the hosting companies from whom the reporter rents space—probably have the same knowledge as the reporter, at least once the government alerts them about the situation. But they quite likely have no intention to facilitate crime. Their decision not to take down the articles may have been simply motivated by a desire to let the reporter say what he wants to say.

And yet the value and the harm of the speech are the same whether the government is pursuing a reporter who intends the speech to help facilitate crime, or site operators who merely know that the speech has this effect. The one difference between the two articles might be the moral culpability of the speakers, which I'll discuss shortly. For now, though, we see that the practical effects of the articles are quite similar.

Of course, there is precedent for using intent (and not just knowledge or recklessness) as part of First Amendment tests: Under the incitement test, speech that is intended to and likely to cause imminent harm is unprotected. Speech that the speaker merely knows is likely to cause imminent harm is protected.

The incitement cases, though, have never fully explained why an intent-imminence-likelihood test is the proper approach (as opposed to, say, a knowledge-imminence-likelihood test). Moreover, as the preceding subsection mentioned, the main barrier to liability under the *Brandenburg* test has generally been the imminence prong, not the intent prong; and given the imminence prong, it's not really clear whether it makes much of a difference whether the incitement test requires intent or mere knowledge.

Considering the quintessential incitement example—the person giving a speech to a mob in front of someone's house—reinforces this. One can imagine some such person simply knowing (but regretting) that the speech would likely lead the mob to attack, as opposed to intending it. But, first, this scenario would be quite rare. Second, it's not clear how a jury would reliably determine whether the speaker actually intended the attack or merely knew that it would happen. And, third, if the speaker did know the attack would happen as a result of his words, it's not clear why the protection given to his speech should turn on whether he intended this result.

In the era before the Court adopted the imminence prong, Justice Holmes did defend the distinction between an intent-plus-likelihood test and a mere knowledge-plus-likelihood test. And indeed, if no imminence prong were present, a knowledge-plus-likelihood test would be inadequate: People would then be barred from expressing their political views whenever they knew that those views could lead some listeners to misbehave, and this would be too broad a restriction.⁵⁰ But an intent-plus-likelihood test proved inadequate, too, partly because of the risk that jurors would err in finding intent. So while the intent-plus-likelihood and the intent-imminence-likelihood tests have long been part of the incitement jurisprudence, it's not clear that either of them offers much

50. *See id.* at 627 (“A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime [under a statute limited to statements made ‘with intent . . . to cripple or hinder the United States in the prosecution of the war’].”).

support for focusing on intent in other free speech exceptions: The intent prong proved to be not speech-protective enough in the intent-plus-likelihood test; and in the intent-imminence-likelihood test it is the imminence requirement, not the intent requirement, that strongly protects speech.

d. *Moral culpability*

So the one remaining potential distinction between intentionally and knowingly crime-facilitating speech is the speaker's moral culpability. Trying to help people commit or get away with their crimes is generally reprehensible. Trying to inform the public about perceived government misconduct, persuade the public that some laws are futile, or even to entertain people, while regretfully recognizing that this will as a side effect help people get away with their crimes, is much more defensible.

It seems to me, though, that this advantage of the intent test is more than overcome by its disadvantages, described in the preceding pages. Judges and juries likely will often mistake knowledge for intention, especially when the speakers hold certain political views—either views that seem particularly consistent with an intent to facilitate a certain crime, or just views that make factfinders assume the worst about the speaker.

As a result, many speakers who do not intend to facilitate crime will be deterred from speaking. Some speech will be punished when equally harmful and valueless speech—perhaps including copies of the punished speech, posted on mirror Web sites—will be allowed. And the one ostensible advantage of the intent test, which is distinguishing the morally culpable intentional speakers from the morally guiltless knowing speakers, won't be much served, precisely because of the substantial risk that factfinders won't be able to easily tell the two apart.

C. *Distinctions Based on How Speech Is Advertised or Presented*

1. *Focusing on whether speech is advertised or presented as crime-facilitating*

a. *The inquiry*

Dual-use products are sometimes specially regulated when they have features that seem especially designed for the criminal use, or that are promoted in a way that seems to emphasize the criminal use. For instance, products that circumvent technological copy protection are prohibited if (among other circumstances) they are “primarily designed or produced for the purpose of” circumvention, or are “marketed . . . for use” in circumvention. Drug paraphernalia laws focus on whether a product has been “designed or marketed for use” with drugs. Likewise, one court has concluded that a gun manufacturer could be

held liable for injuries caused by its product in part because the manufacturer advertised the gun as being “resistant to fingerprints.”

This is not quite an inquiry into the defendant’s purpose: Someone who is distributing programs “primarily designed or produced for the purpose of” circumvention can be held liable even if his only purpose is to make money, to strike a symbolic blow against the law that bans such distribution, or to promote the noncircumvention uses of the program. Many such distributors might sincerely prefer (though not expect) that by some miracle no buyer ever uses the product for criminal purposes, among other things because then there would be less likelihood that the distributor would be sued or prosecuted. They would know the criminal uses are likely, but not have the purpose of promoting such uses; and yet they would still be held liable.

Likewise, I suspect that the *Hit Man* court was wrong to argue that the framing or advertising of the book—there, its characterization as a manual for contract killers—is “highly probative of the publisher’s intent” to facilitate crime. As I’ve mentioned above, 13,000 copies of the book were sold. That seems to be much greater than the likely set of would-be contract killers who would learn their trade from a book (especially a book written by a person using the pseudonym “Rex Feral”). The publisher and the author must have known this, and thus likely intended their market to be armchair soldiers of fortune who like to fantasize about being Nietzschean ubermensches. Perhaps, as I discuss below, distributing *Hit Man* should still be punished because of the way the book was framed or promoted. But this would have to be because of something other than the light that the framing and promotion sheds on the publisher’s intent.

On the other hand, the “designed or marketed for criminal uses” inquiry doesn’t simply ask whether the defendant knew of the crime-facilitating uses—a seller of cigarette rolling paper wouldn’t be held liable simply because he knows that many buyers use it for marijuana rather than tobacco. Rather, the test for distributors would be whether the distributor is knowingly distributing material that’s being advertised (by him) or designed or presented (by the author) in a way that’s intended to especially appeal to criminals. And the test for authors would be whether they are purposefully producing material that especially appeals to criminals, though not necessarily whether their purpose is actually to help those criminals.⁵¹

Some of the examples of crime-facilitating speech seem to fit within this definition, and the definition would often track many people’s moral intuitions.

51. This inquiry treats an author’s decisions about how to frame the work (writing it as a manual about how to commit contract murder rather than as a book about how contract murderers operate) the same as the publisher’s decisions about how to promote the work (advertising it as a manual about how to commit contract murder rather than as a book about how contract murderers operate). Both decisions are choices about how the information is presented to potential readers, and both may (as the material below discusses) affect what sorts of readers the book attracts.

The *Hit Man* murder manual and *The Anarchist Cookbook*, for instance, seem particularly blameworthy precisely because their content and their promotional advertising portray them as tools for committing crime; they are different in this from a novel about contract killers and a chemistry book about explosives. A Web site that presents itself as a source of research papers that students can plagiarize seems different from an online encyclopedia, though the encyclopedia can also be used for plagiarism and the papers can also be used for legitimate research. And this is true even if the books and Web sites are published by people who intend only to make money, not to facilitate crime.

The definition would also cover Web pages that mirror the contents of suppressed crime-facilitating works, such as some of the pages that mirror *Hit Man* itself. The mirror page operator may intend only to strike a blow against censorship, and not to facilitate crime; and I suspect that many people would be less eager to punish him than they would be to punish the publisher or the author of the original site. But the mirror page operator likely does know that the material he's distributing was designed or presented—not by him, but by its author—to especially appeal to criminals. His actions would thus be on the punishable side of the line discussed here, even if he's motivated by love of free speech rather than by love of money.

b. *Ginzburg v. United States and the “pandering” doctrine*

This inquiry into how a work is promoted or framed already takes place in some measure—though controversially—in the “pandering” doctrine, which is part of obscenity law.

Obscenity law is based on the view that sexually themed material can have “a corrupting and debasing impact [on its consumers,] leading to antisocial behavior.” On the other hand, obscenity law also recognizes that much sexually themed material can also have serious value to its other consumers.

Under this framework, many sexually themed works would be dual-use. Consider a work that has some highly sexual portions that aren't valuable by themselves (or are valuable only to those who are merely seeking sexual arousal), but that taken as a whole has serious scientific, literary, artistic, or political value. Some consumers will view the work for that serious value. But other consumers may look only at the valueless portions of the work, and do so out of prurient motives—when viewed by these consumers, the work will, under the logic of obscenity law, be harmful rather than valuable. Generally speaking, such dual-use works are constitutionally protected. Only those works that the law views as single-use, because they lack serious value and thus are likely to be used only for their prurient appeal, are punishable.

But under the pandering cases, of which the leading one is *Ginzburg v. United States*, a work that would otherwise not be obscene—perhaps because it has serious value—may be treated as obscene if it's “openly advertised to appeal to the erotic interest of . . . customers.” For instance, one of the works in

Ginzburg was a text called *The Housewife's Handbook on Selective Promiscuity*. According to the Court, “[t]he Government [did] not seriously contest the claim that the book has worth” for doctors and psychiatrists. The book apparently sold 12,000 copies when it was marketed to members of medical and psychiatric associations based on its supposed “value as an adjunct to therapy,” and “a number of witnesses testified that they found the work useful in their professional practice.”

Because Ginzburg marketed the work as pornographic, however, his distribution of the book was treated as constitutionally unprotected, though distributing the same book in ways that didn't appeal to consumers' erotic interest would have been protected. The obscenity inquiry, the Court held, “may include consideration of the setting in which the publication [was] presented,” even if “the prosecution could not have succeeded otherwise.”

Why should the promotional advertising, or the purposes for which the product was designed—as opposed to the potential uses that the product actually has—affect the analysis? After all, the potential harm and value flow from the substance of the work, not its advertising or its authors' purposes. As Justice Douglas said when criticizing *Ginzburg*,

The sexy advertisement neither adds to nor detracts from the quality of the merchandise being offered for sale. And I do not see how it adds to or detracts one whit from the legality of the book being distributed. A book should stand on its own, irrespective of the reasons why it was written or the wiles used in selling it.

One might say the same about the advertisement that touts a work's utility for criminal purposes.

There are three plausible responses to this, though for reasons I'll explain below I think they are ultimately inadequate.

(1) When a dual-use work is promoted as crime-facilitating or is designed to be useful to criminals, more of its users are likely to be criminal. The advertisements or internal design elements will tend to attract the bad users and repel the law-abiding ones.

Restricting this speech will thus mostly obstruct the illegal uses, especially since the law-abiding readers will still be able to read material that contains the same facts but isn't promoted or framed as crime-facilitating. A criminologist interested in contract killing, a novelist who wants to write plausibly about contract killers, or just a layperson who's curious about the subject would still be able to get information from books that aren't framed as contract murder manuals. A high-school student who genuinely wants to research, not plagiarize, would still be able to get information from encyclopedias and other Web pages that aren't pitched as term-paper mills.

The *Ginzburg* Court justified its decision partly in this way: It suggested that the book could lawfully be distributed “if directed to those who would be likely to use it for the scientific purposes for which it was written”; but though sales of the book to psychiatrists would have value, “[p]etitioners . . . did not

sell the book to such a limited audience, or focus their claims for it on its supposed therapeutic or educational value; rather, they deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed.” As Justice Scalia—the most prominent modern supporter of the *Ginzburg* approach—put it, “it is clear from the context in which exchanges between such businesses and their customers occur that neither the merchant nor the buyer is interested in the work’s literary, artistic, political, or scientific value.”

(2) Some material that is designed to be especially useful to criminals may be optimized for criminal use. Though the same information or features might be available from other sources, the other books or devices may be harder to use for criminal purposes, and perhaps may be more likely to lead to errors. A book on the chemistry of drugs that’s designed to help criminals make drugs will likely offer special tips (for instance, about how to conceal one’s actions) that would be missing in books aimed at chemistry students or lawful drug producers.

Bans on books designed to help criminals may thus make it harder for criminals to gather and integrate the information they need to accomplish their crimes. This won’t stymie all criminals, of course, but it might dissuade some, and cause others to make mistakes that might get them caught.

(3) Distributing or framing material in a way that stresses its illegal uses seems especially shameless. Even if the public promotion of the illegal uses is insincere—if the speaker or publisher actually doesn’t intend to facilitate the illegal uses, but simply wants to make money (for instance, through the edgy glamour that the promotion provides)—the promotion may appear particularly reprehensible. It’s therefore tempting to hold the speaker at his word, to treat his speech as solely focused on those things that the advertising or framing of the speech stressed, and not to let him defend himself by citing the entertainment value (as with *Hit Man*) of the speech.

So, the theory goes, restrictions on advertising that promotes the improper uses of a work burden lawful uses only slightly, because the same material could be distributed if it weren’t billed as promoting illegal uses. And these restrictions have some benefit, because they somewhat decrease the illegal uses. The same can be said of restrictions on speech whose text (rather than its promotional advertising) describes the work as crime-facilitating or sexually titillating. The line between material that’s advertised or framed as crime-facilitating and material that’s advertised or framed in other ways despite its crime-facilitating uses is thus conceptually plausible.

At the same time, the line often requires subtle and difficult judgments, because the suggested use of a statement will sometimes be unstated or ambiguous, and different factfinders will draw different inferences about it. Is a list of abortion providers, boycott violators, strikebreakers, police officers, or political convention delegates crafted to especially appeal to readers who want to commit crimes against these people, or to readers who want to lawfully remonstrate

with them, socially ostracize them, or picket them? Is an article that describes the flaws in some copy protection system crafted to especially appeal to would-be infringers, or to readers who are curious about whether technological attempts to block infringement are futile? Many publications simply present facts, and leave readers to use them as they like. Unless we require that each publication explicitly define its intended audience, it may often be hard to determine this audience.

And lacking much objective evidence about the intended audience, factfinders may end up turning to their own political predilections. As Part III.B.2 suggested, guesses about a person's purposes—here, about the audience to which the author is intending the work to appeal—tend to be influenced by the factfinder's sympathy or antipathy towards the person. If we think antiabortion activists are generally good people trying to save the unborn from murder, we are likely to give the writer and the readers of a list of abortion providers the benefit of the doubt, and to assume the list was aimed only at lawful picketers and protesters. If we think antiabortion activists are generally religious fanatics who seek to suppress women's constitutional rights, we are likely to assume the worst about their intentions. There is thus a substantial risk that factfinders will err, and will err based on the speaker's and their own political viewpoints, in deciding whether something is "designed to appeal to criminals."

Finally, if the law starts focusing on how the speech is framed or marketed, many speakers—both those who are really trying to appeal to criminals and those who aren't—will just slightly change their speech so that it doesn't look like an overt appeal to illegal users. (Some term-paper Web sites, for instance, already present themselves as offering mere "example essays," and say things like "the papers contained within our web site are for research purposes only!") Recall that one of the purported advantages of the focus on "pandering" is precisely that it won't burden speech much, since the underlying information could still be communicated if it's not presented in a way that stresses the illegal uses.

If this happens, then there are two possible outcomes. One is that people who genuinely do want to appeal to criminals will be able to get away with it. The pandering exception will be narrow enough that it won't much burden legitimate speakers, but at the same time so narrow that it won't much help prevent crime.

The other possibility is that lawmakers and judges will understandably seek to prevent these "end runs" around the prohibition—and the steps taken to prevent them may end up covering not just those end runs, but also legitimate speech. The rule may start as a narrow First Amendment exception for speech that's explicitly promoted in a way that makes it appealing to criminals; but then even legitimate, well-intentioned promotion of dual-use speech would be perceived as exploiting a "loophole" in the rule. This perception would then tend to yield pressure for categorizing more and more speech under the "promoted as crime-facilitating" label. And this tendency will be powerful because

it would reflect a generally sensible attitude: the desire to make sure that rules aren't made irrelevant by easy avoidance.

This pressure for closing supposed loopholes has been visible with other speech restrictions. For instance, the characterization of obscenity as being “utterly without redeeming social importance” led some pornographers to add token political or scientific framing devices: a purported psychologist introducing a porn movie with commentary on the need to explore sexual deviance, or a political aside on the evils of censorship. The Court reacted by rejecting the “utterly without redeeming social importance” standard and demanding “serious literary, artistic, political, or scientific value.” This change helped close the loophole to some extent—but only at the cost of punishing speech that “clearly ha[s] some social value,” though “measured by some unspecified standard, [the value] was not sufficiently ‘serious’ to warrant constitutional protection.” A seemingly very narrow restriction proved so easy to circumvent that the Court shifted to a broader one.

Likewise, in *Buckley v. Valeo*, the Court—aiming to minimize the burden on free speech rights—narrowly interpreted the Federal Election Campaign Act’s restrictions on independent expenditures “relative to a clearly identified candidate” as covering only speech “that include[s] explicit words of advocacy of election or defeat of a candidate.” Political advertisers then understandably avoided the restrictions by avoiding such explicit words, so that the advertisements would be treated as issue advocacy rather than candidate advocacy.

Supporters of campaign finance regulation then naturally responded by condemning such speech as “sham issue advocacy” and urging that it be restricted. The Bipartisan Campaign Reform Act ultimately changed the express advocacy definition to cover any ad that “refers to a clearly identified [federal] candidate” within sixty days of the election. And the Supreme Court upheld the new rule, citing among other things the need to close the loophole. The original narrow restriction set forth by the Court proved so easy to circumvent that this circumvention created considerable pressure for a broader restriction.

The same may easily happen to restrictions on speech that’s explicitly presented as crime-facilitating: Such narrow restrictions will likely lead many authors and distributors to characterize their works less explicitly, with what some see as a wink and a nudge. Legislators may then understandably try to enact broader restrictions aimed at rooting out such “shams.” Yet these broader restrictions may affect not just the insincere relabeling of crime-facilitating speech, but also the distribution of valuable material that’s genuinely designed for and marketed to law-abiding readers.

The main advantages of focusing on how the work is promoted and framed would thus disappear. Such a focus offers the prospect that (1) the material would still remain distributable when properly promoted, and (2) courts could apply the rule by focusing on the objective terms of the work and its advertising, while minimizing investigations of distributors’ or authors’ hidden intentions. But the attempts to prevent end runs, code words, and exploitation of

loopholes will tend to make it harder to distribute the material even to law-abiding buyers, since people will always suspect that the supposed attempt to focus on law-abiding buyers is just a sham, and that the real market is criminals. And courts may then have to return to trying to determine distributors' or authors' presumed intentions, now by asking whether, for instance, a statement that "Here's how common copyright piracy sites are" is an insincere cover for what the author really wanted to say, which is "Here's how you can infringe copyright."

So on balance, a focus on whether the work panders to the criminal users will probably do more harm than good. It offers only a small degree of protection from crime—the premise of the proposed distinction, after all, is that the work will still remain available if it's promoted in a way that isn't aimed at a criminal audience. It will likely be hard to accurately and fairly apply. And it carries the risk that the narrow restrictions will end up growing into broad ones.

2. Focusing on whether speech is advertised or presented as an argument rather than just as pure facts

Some speech that contains crime-facilitating facts is presented as crime-facilitating. Some is framed as political commentary aimed at the law-abiding. And some is framed as just presenting the facts, either by themselves or as part of a broader account. A newspaper article might, for instance, describe a secret wiretap without either encouraging the criminals to flee, or arguing that secret wiretaps should be abolished. A Web page might explain how easy it is to change the supposed "ballistic fingerprint" of a gun, without urging criminals to use this to hide their crimes, but also without arguing that the ease of this operation means that legislation requiring all guns to be "fingerprinted" is thus misguided.

It would be a mistake, though, to protect such purely factual speech less than expressly political speech. Information is often especially useful to people's political decisionmaking when it comes to them as just the facts, without the author's political spin. Many newspapers generally operate this way, at least most of the time: They give readers the facts on the news pages, and usually save the policy conclusions for the editorial page.

Some of the news articles include commentary from both sides as well as the news, but many don't. They present just the information, in the hope that readers will be able to use that information—for instance, that secret wiretaps were employed on this or that occasion—to make up their own minds. This is a legitimate and useful way of informing the public.

Moreover, a rule distinguishing purely factual accounts from factual accounts that are coupled with political commentary seems easy to evade, even more so than the "pandering" rule discussed in the preceding pages. Just as the Court saw "little point in requiring" advertisers who sought constitutional protection to add an explicit "public interest element" to their advertising of prices,

“and little difference if [they did] not” add such an element, so there seems to be little benefit in requiring people to add political advocacy boilerplate in order to make their factual assertions constitutionally protected.⁵²

D. Distinctions Based on the Harms the Speech Facilitates

1. Focusing on whether the speech facilitates severe harms

a. Generally

Some speech facilitates very grave harms: the possible construction of a nuclear bomb or a biological weapon, the torpedoing of a troopship, or the murder of witnesses, abortion providers, or boycott violators. Some facilitates less serious harms: drugmaking, suicide, burglary, or copyright infringement.

When legislatures decide how to deal with dual-use technologies, they normally and properly consider how severe the harmful uses can be. Machine guns and VCRs can both be used for entertainment as well as for criminal purposes. Yet machine guns are much more heavily regulated, because their illegal uses are more dangerous. It's likewise appealing to have the constitutional protection of crime-facilitating speech turn to some extent on the magnitude of the crime being facilitated.

But these severity distinctions are much harder for courts to draw in constitutional cases than they are for legislatures to draw when drafting statutes (as I discuss in much more detail elsewhere⁵³). In practice, most constitutional severity distinctions that are available for crime-facilitating speech would likely be drawn at quite low levels, and would authorize the restriction of a wide range of valuable speech.

For instance, the Court has at times made constitutional rules turn on the legislature's own judgments of severity, as reflected in the sentences the legislature has authorized for a crime. But the most obvious legislatively defined lines that the courts can adopt, such as the lines between crimes and torts, jailable offenses and nonjailable offenses, and between felonies and misdemean-

52. See, e.g., the books cited *supra* note 17. The first, *Improvised Modified Firearms*, describes how people have throughout recent history made guns themselves, and argues that “[t]he message is clear: if you take away a free people's firearms, it will make others. As these pages demonstrate, the methods, means, and technology are simple, convenient, and in place.” TRUBY & MINNERY, *supra* note 17, at outside back cover. The second, *Home Workshop Guns for Defense and Resistance*, describes “the methods, means, and technology,” and thus helps show whether they are indeed “simple, convenient, and in place.” HOLMES, *supra* note 17. There is little reason to conclude that the two books should be constitutionally protected if they are published in one volume, but that the second book should be unprotected if published separately, because it lacks the political argument that the first book provides. Both books, incidentally, come from the same publisher.

53. See Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957 (2004) (discussing this issue).

ors, would classify most of the examples in the Introduction as being on the “severe” side of the line: For example, a newspaper article that provides the URL of an infringing Web site may facilitate criminal copyright infringement, which is potentially a felony.

Likewise, if courts rely on fairly bright-line inherent severity distinctions, such as between violent crimes and nonviolent crimes, most such distinctions would authorize restricting a wide range of crime-facilitating speech. Chemistry textbooks that describe explosives, novels that describe nonobvious ways of poisoning someone, newspaper articles that mention the name of a crime witness, and publication of the names of boycott violators or strikebreakers can all facilitate violent crimes.

Courts could try to draw the line at a higher level, without pegging it to some established or intuitively obvious distinction. But such ad hoc line-drawing may prove unpredictable both for speakers and for prosecutors; and it may also over time lead the severity line to slip lower and lower, when courts conclude—as the Supreme Court has done as to the Cruel and Unusual Punishment Clause—that they ought to “defer[]” to “rational legislative judgment” about the “gravity of the offense.”

Courts may be reluctant to distinguish, for instance, bans on bomb-making information from bans on drugmaking information, given that many people find drug manufacturing to be as deadly as bomb manufacturing (and even if the judges might themselves have taken the contrary view had they been legislators). Likewise, once courts have upheld bans on drugmaking and bomb-making information, they may be reluctant to overturn a similar legislative judgment as to information that helps people break into banks or computer security systems: Though these are just property crimes rather than violent crimes or drug crimes, they are felonies that in the aggregate can lead to billions of dollars in economic harm. And once courts uphold bans on that sort of crime-facilitating information, they may find it hard to distinguish, say, information that describes how people evade taxes, that points to copyright-infringing sites, or that discusses holes in copy protection schemes.

Such deference to legislatures seems particularly likely because many judges would find it both normatively and politically attractive. Deference avoids a conflict with legislators and citizens who may firmly and plausibly argue that certain crimes are extremely serious, and who may resent seeing those crimes treated as being less constitutionally significant than other crimes. Deference shifts from the judges the burden of drawing and defending distinctions that don’t rest on any crisp rules. Deference fits the jurisprudential notion that arbitrary line-drawing decisions, such as arbitrary gradations of crime, arbitrary threshold ages for driving or drinking, and so on—decisions where one can logically deduce that there’s a continuum of gravity or maturity, but where one can’t logically deduce the proper dividing line—are for the legislature rather than for judges.

If one thinks such deference is sound, then one might well endorse a rule under which a broad category of crime-facilitating speech—for instance, all knowingly crime-facilitating speech—would be constitutionally unprotected. This would then leave it to legislatures to decide which crime-facilitating speech should be punished and which shouldn't be.

But it seems to me that such a broad new exception would be a mistake, and that even speech which may help some listeners commit quite severe crimes, including murder, should still be protected. The First Amendment requires us to run certain risks to get the benefits that free speech provides, such as open discussion and criticism of government action, and a culture of artistic and expressive freedom. These risks may include even a mildly elevated risk of homicide—for instance, when speech advocates homicide, praises it, weakens social norms against it, leads to copycat homicides, or facilitates homicides. Each such crime is of course a tragedy, but a slightly increased risk even of death—a few extra lives lost on top of the current level of over 17,000 homicides per year—is part of the price we pay for the First Amendment, and for that matter for other Bill of Rights provisions.

b. *Extraordinarily severe harms*

So it seems to me that dual-use crime-facilitating speech should not be restrictable even though it may help some readers commit some very serious crimes. Yet this does not necessarily dispose of speech that may cause extraordinarily severe harms—speech that, for instance, might (even unintentionally) help terrorists synthesize a smallpox plague, or might help foreign nations build nuclear bombs.

The Bill of Rights is an accommodation of the demands of security and liberty, which is to say of security against criminals or foreign attackers and security against one's own government. The rules that it sets forth, and that the Supreme Court has developed under it, ought to cover the overwhelming majority of risks, even serious ones and even ones that arise in wartime.

But it's not clear that those rules, developed against the backdrop of ordinary dangers, can dispose of dangers that are orders of magnitude greater. This is why the usual Fourth Amendment rules related to suspicionless home searches might be stretched in cases involving the threat of nuclear terrorism; why we continue to have a debate about the propriety of torture in the ticking nuclear time bomb scenario; and why, in a somewhat different context, the Constitution provides for the suspension of habeas corpus in cases of rebellion or invasion.

Likewise, avoiding extraordinary harms—especially harms caused by information that helps others construct nuclear and biological weapons,⁵⁴ weap-

54. See, e.g., Christopher F. Chyba & Alex L. Greninger, *Biotechnology and Bioter-*

ons that can kill tens of thousands at once—may justify restrictions on speech that would facilitate the harms.⁵⁵ The government might, for instance, prohibit publication of certain highly dangerous information, even when the information is generated by private entities that have never signed nondisclosure agreements with the government.⁵⁶ In effect, research in these fields could then only be conducted by government employees or contractors, or at least people who are operating with government permission: They might be able to share their classified work product with others who have similar security clearances, but they couldn't engage in traditional open scientific discussion.

The restrictions would indeed interfere with legitimate scientific research, and with debates about public policy that require an understanding of such scientific details.⁵⁷ For instance, if people weren't free to explain exactly how the terrorists might operate, then it would be harder to debate, for instance, whether the distribution of certain laboratory devices or precursor chemicals should be legal or not, or whether our civil defense strategies are adequate to deal with the possible threats. The restrictions may even prove counterproductive, especially if they are badly designed or if classified research into countermeasures is inevitably much less effective than open research: They might interfere with the good guys' ability to produce effective defenses—for instance, effective defenses against biological weapons, or effective detection mechanisms for smuggled nuclear bombs—more than they interfere with the bad guys' ability to create and deploy weapons.

The restrictions would thus require more unchallenged trust of the government than free speech law normally contemplates. And there would indeed be some contested cases (for instance, what about discussions of possible gaps in security at nuclear power plants?); there would be a danger that the restric-

rorism: An Unprecedented World, 46 SURVIVAL 143, 148-53 (2004) (pointing out the danger posed by legitimate scientific research such as the 2001 publication of a paper that detailed the construction of a vaccine-resistant mousepox virus, technology that might also be usable to create a vaccine-resistant smallpox virus).

55. A standard cost-benefit analysis might ask what the expected value of the harm would be—the magnitude of the harm multiplied by its probability. Nonetheless, here the probability of harm is so hard to estimate that it can't be a practically useful part of the test. I would therefore (tentatively) support the restriction of speech that explains how nuclear or biological weapons can be built, without asking courts to guess the likelihood that the speech will indeed be used this way; and I suspect that courts will in fact allow such restrictions.

56. As I mentioned in note 8, this Article doesn't discuss what rules might constrain the government acting as employer or contractor, when it tries to control disclosures by people who learned information while working for the government.

57. Consider, for instance, the mousepox virus paper discussed in Chyba & Greninger, *supra* note 54: By pointing out that vaccine-resistant pox viruses can be created without vast difficulty, the paper both advanced scientific knowledge and helped prove that this was a threat that governments need to confront—since of course even without the paper terrorists or hostile governments might have been able to perform the same work. At the same time, though, the paper also unfortunately exacerbated the threat.

tions would over time broaden to include less dangerous speech; and there would be some undermining of our culture of political and scientific freedom.⁵⁸

These are all reasons to keep the exception narrow, by reserving it for the truly extraordinary cases involving, as I mentioned, the risk of tens of thousands of deaths. These cases would be widely understood as being far outside the run of normal circumstances, so that they would always be seen as highly unusual exceptions to the normal rule of protection. And it seems to me that the risks of such a narrow exception are worth running, in order to try to avoid the risks of mass death.

As importantly, whether I'm right or wrong, chances are that judges will indeed allow this sort of restriction, as the trial court did for the H-bomb plans in *United States v. Progressive, Inc.* And if judges do uphold such restrictions, it's important to have a ready framework that would cabin the restrictions in a way that prevents them from spreading to other, less dangerous kinds of speech.

The best way to do that, I think, is to have the judges use a test that explicitly turns on the extraordinary harms that the speech facilitates, harms on the magnitude of tens of thousands of deaths in one incident, which are far outside the normal range of danger that free speech and other liberties can help create. Rationalizing restrictions on such speech in other ways—for instance, by characterizing all crime-facilitating speech as definitionally unprotected conduct rather than speech, by characterizing the laws punishing the speech as generally applicable laws that are immune from serious First Amendment scrutiny, or by distinguishing political advocacy from scientific speech—risks legitimizing much broader prohibitions that would apply even to less harmful speech, speech that ought to remain protected.⁵⁹

58. I would not endorse a restriction on crime-*advocating* speech that advocates such severe crimes. I strongly doubt that either terrorists' or foreign governments' decisions to build nuclear or biological weapons are likely to be much influenced by the sort of persuasive advocacy that the law is likely to be able to reach. The law might be able to suppress the flow of information about such weapons, but not, I think, the desire to build them.

Some speech that advocates other sorts of crime—for instance, denunciations of the government and promotion of violent revolution—may indeed ultimately lead to hundreds of thousands of deaths. Most civil wars and revolutions are indeed largely fomented by speech. But such speech would be harmful only to the extent that it persuades tens of thousands of people; and in the process, it is almost certain to also convey potentially valuable and legitimate criticism of the existing order to millions of people. The burden on public discourse of suppressing such advocacy is even greater than the burden of suppressing crime-facilitating information.

59. The same is true of having the test turn on the speaker's purpose instead of the gravity of the harm; but such an intent focus also probably won't satisfy those judges who do want to restrict the speech, because in many situations—such as in the *Progressive* case itself, or when a Web site mirrors speech to protest censorship—the harmful speech is not intended to facilitate crime. See *supra* Part III.B.2.a. And if the judges avoid this by treating knowledge of danger as “constructive intent,” then the exception would in effect broadly punish knowingly crime-facilitating speech, without the extra protection that an “extraordi-

E. *Distinctions Based on Imminence of Harm*

Some crime-facilitating speech, such as a warning that the police are coming, facilitates imminent harm or imminent escape from justice. In the incitement test, which is applicable to crime-advocating speech, imminence is an important requirement, perhaps the most important one.

But there is little reason to apply such a requirement to crime-facilitating speech. The standard argument for punishing only advocacy of imminent crime is that such advocacy is especially harmful: It increases the chance that people will act right away, in the heat of passion, without any opportunity to cool down or to be dissuaded by counterarguments.

Crime-facilitating speech, though, generally appeals to the planner, not to the impulsive criminal. When someone tells a criminal how to build a particularly sophisticated bomb, that information is at least as dangerous when it's said months before the bombing as when it's said the day before the bombing. It's hard to see, then, why such speech should be treated as constitutionally different depending on whether it facilitates imminent crime or the criminal's future plans.

F. *Distinctions Between Criminal Punishments and Civil Liability*

Finally, one might distinguish restrictions on crime-facilitating speech based on whether they criminalize such speech or just impose civil liability. This, though, would be unsound. If crime-facilitating speech is valuable enough to be protected against criminal punishment, then it should be protected even against civil liability. If it isn't valuable enough to be protected against civil liability, then there is little reason to immunize it against criminal punishment.

To begin with, if a lawsuit leads the court to enjoin the speech, after a trial on the merits, then the speech *will* become criminally punishable. If the defendant refuses to stop distributing the speech after such an injunction is issued, he may be sent to jail for criminal contempt.

Furthermore, the threat of punitive damages or even compensatory damages can be a powerful deterrent to speech, as the Court recognized in *New York Times v. Sullivan*. The threat of losing all one's assets—which for non-corporate speakers will likely include their homes and life's savings—may, for many speakers, be a deterrent not much smaller than the threat of jail. And this deterrent effect is further increased by the risk that damages will be awarded without proof beyond a reasonable doubt and the other procedural protections available in criminal trials.

nary harm” prong would require.

In some fields of tort law, where actors reap most of the social benefit of their conduct, purely compensatory damages may not have as large a deterrent effect as would the threat of prison or financial ruin: Such damages would merely require actors to internalize the social costs as well as the social benefits of their conduct, which would in theory foster a socially optimal level of the conduct by providing just the right amount of deterrence. If your conduct (say, your using blasting for construction on your property) produces more benefits than harms, then you will still engage in the conduct despite being held liable for the harm you cause—you would just use the profits from the beneficial effects of the conduct to pay for the damages needed to compensate victims for the harmful effects. The availability of compensatory damages would only prevent the conduct if the conduct produces more total harm than benefit, and in such a situation we should want the conduct to be deterred.

But even if this argument works for some kinds of conduct, there's no reason to think that compensatory damages for speech will provide such a socially optimal deterrent. Valuable speech is generally a public good, which has social benefits that aren't fully internalized (or aren't internalized at all) by the speakers. Requiring people who communicate dual-use speech to pay for its harms when they aren't paid for its social benefits will thus overdeter many speakers.

At the same time, purely compensatory liability will also underdeter many other speakers. If the legal system really wants to suppress the speech (assuming that the speech can practically be suppressed), it needs a more forceful tool than compensatory damages.

The Court has routinely declined to distinguish criminal liability from civil liability for First Amendment purposes, at least when the speaker is acting recklessly, knowingly, or intentionally. As to crime-facilitating speech, this approach seems correct.

G. Summary: Combining the Building Blocks

In the above discussion, I've tried to identify the pluses and minuses of each potential component of a crime-facilitating speech test. By doing this, I've tried to be thorough, to break the problem into manageable elements, and to provide a perspective that may be helpful even to those who may not agree with my bottom line.

Here, though, is my bottom line, which I can present quickly because it builds so heavily on the long discussion above. In my view (which I express in part with some confidence and in part tentatively), there should indeed be a First Amendment exception for speech that substantially facilitates crime, when one of these three conditions is satisfied:

(1) When the speech is said *to a few people who the speaker knows are likely to use it to commit a crime or to escape punishment* (classic aiding and

abetting, criminal facilitation, or obstruction of justice):⁶⁰ This speech, unlike speech that's broadly published, is unlikely to have noncriminal value to its listeners. It's thus harmful, it lacks First Amendment value, and any such exception is unlikely to set a precedent for something materially broader. I feel quite confident of this.

(2) When the speech, even though broadly published, has *virtually no non-criminal uses*—for instance, when it reveals social security numbers or computer passwords:⁶¹ This speech is likewise harmful and lacks First Amendment value. Here, I'm more tentative, largely because I think the line-drawing problems increase the risk that valuable speech will be erroneously denied protection, and because I think this exception may indeed eventually be used to support other, less justifiable restrictions on broadly published speech. Nonetheless, it seems to me that these risks are sufficiently small to justify allowing a narrow exception.

(3) When the speech facilitates *extraordinarily serious harms, such as nuclear or biological attacks*:⁶² This speech is so harmful that it ought to be restricted even though it may have First Amendment value. Here, I'm again somewhat tentative, because I think there are serious definitional problems here, a near certainty that some valuable speech will be lost, and a substantial possibility that the restriction may lead to broader ones in the future. Nonetheless, extraordinary threats sometimes do justify extraordinary measures, if care is taken to try to keep those measures limited enough that they don't become ordinary.

It also seems to me—though it didn't seem so to me when I first set out to write this Article—that two other kinds of restrictions are somewhat plausible, though I ultimately conclude that they aren't worthwhile:

(1) There is a plausible argument that speech should be restrictable when *its only value (other than to criminals) seems to be entertainment*.⁶³ The Court has rightly held that entertainment should generally be protected because it often comments on moral, political, spiritual, or scientific matters—but this need not mean that particular crime-facilitating details in works of entertainment should be categorically protected even when they're unnecessary to the broader themes. At the same time, any special exception for entertainment is likely to be not very beneficial, and is likely to lead to substantial risks of error, excessive caution on the part of authors, and potential slippage to broader restrictions.

(2) Though *Ginzburg v. New York*, which held that how a work is marketed may affect its First Amendment status, does not enjoy a great reputation, it may actually make a surprising amount of sense: When a work is dual-use, *some*

60. See *supra* Part III.A.2.a.

61. See *supra* Part III.A.2.b.

62. See *supra* Part III.D.1.

63. See Volokh, *supra* note 1, at Part III.A.3.c.

marketing or framing of the work may be intended to appeal predominantly to those who would engage in the harmful and valueless use, rather than in the valuable use.⁶⁴ Such marketing or framing might be outlawed without outlawing the underlying information. Nonetheless, here too the marginal benefit of banning works that are marketed or framed as crime-facilitating is low enough, and the potential costs are high enough, that on balance such bans are probably not worthwhile.

Finally, I feel fairly confident that some other potential distinctions—for instance, those based on the speaker's intent,⁶⁵ on whether the speech is about scientific questions rather than political ones,⁶⁶ or on whether it is on a matter of "private concern," "public concern," or "unusual public concern"⁶⁷—are not terribly helpful.

CONCLUSION

The above analysis has suggested a test for when crime-facilitating speech should be constitutionally protected. More importantly, though, I hope it has shown several other things, which should be relevant even to those who disagree with my specific proposal.

(1) Many important First Amendment problems—such as the ones with which the Introduction begins—turn out to be about crime-facilitating speech. They may at first seem to be problems of aiding and abetting law, national security law, copyright law, invasion of privacy law, or obstruction of justice law. But they are actually special cases of the same general problem. Solving the general problem may thus help solve many specific ones.

(2) Precisely because the specific problems are connected, they ought to be resolved with an eye towards the broader issue. Otherwise, a solution that may seem appealing in one situation—for instance, concluding that the *Hit Man* murder manual should be punishable because all recklessly or knowingly crime-facilitating speech is unprotected—may set an unexpected and unwelcome precedent for other situations.

(3) Much crime-facilitating speech has many lawful, valuable uses.⁶⁸ Among other things, knowing just how people commit crimes can help the law-abiding learn which security holes need to be plugged, which new laws need to be enacted, and which existing laws are so easy to avoid that they should be either strengthened or repealed. Similarly, knowing how the police are acting—which wiretaps they're planting or which records they're subpoenaing—can help the law-abiding monitor police misconduct, though it can also help crimi-

64. *See supra* Part III.C.1.

65. *See supra* Part III.B.2.

66. *See supra* Part III.A.3.a.

67. *See supra* Part III.A.3.d.

68. *See supra* Part I.B.

nals evade police surveillance. As with many other dual-use products, the very things that make dual-use speech useful in the right hands are often what make it harmful in the wrong hands.

(4) Some initially appealing answers—for instance, punishing intentionally crime-facilitating speech but not knowingly crime-facilitating speech, allowing crime-facilitating speech to be restricted when the restriction is done using laws of general applicability, and applying strict scrutiny—ultimately prove not very helpful.⁶⁹ Whatever one might think is the right answer here, I hope I've demonstrated that these are wrong answers, or at least seriously incomplete ones. Likewise, it's wrong to say that works such as *Hit Man* have no noncriminal value, or to think that such works could be easily banned on the ground that the publisher's purpose is to promote crime: Perhaps such works should indeed be restrictable, but they can't be restricted on this ground.

(5) The problems with applying these initially appealing proposals to crime-facilitating speech suggest that the proposals may be unsound in other contexts, too. For instance, letting speakers be punished based on their inferred intentions—as opposed to either categorically protecting a certain kind of speech or letting protection turn on the speaker's knowledge or recklessness rather than intention—may prove to be a mistake in a broader range of cases (though not in all cases).⁷⁰ Likewise for assuming that strict scrutiny can provide the answer,⁷¹ or for assuming that speech may generally be restricted by laws of general applicability, even when the law applies to the speech precisely because of the communicative impact that the speech has.⁷² Conversely, other approaches—such as, for instance, focusing on whether the speech is said only to listeners whom the speaker knows to be criminal—may be promising in other contexts, such as criminal solicitation.

(6) The existence of the Internet may indeed make a significant difference to the analysis. Though crime-facilitating speech on the Internet should be treated the same as crime-facilitating speech elsewhere, the creation of the Internet makes it much more difficult to fight crime-facilitating speech anywhere.

In 1990, banning *Hit Man* or *The Anarchist Cookbook* would have likely made it substantially harder for people to get the information contained in those

69. See *supra* Part III.B.2, and Parts II.A and II.B of the unabridged version (cited in footnote 1).

70. Thus, for instance, it's not clear whether the Court's newfound focus on intent in threat cases is wise. See *Virginia v. Black*, 538 U.S. 343, 359-60 (2003). Likewise, I think some lower courts have erred in concluding that knowledge that speech will cause a certain harm (such as emotional distress) or recklessness about that possibility, should suffice to justify restricting the speech.

71. See *supra* Part II.B.

72. See Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277 (2005).

books. Today, the material is a Google search away, and thus easier to access than ever before (despite the lawsuit that led to the *Hit Man* book being taken off the market): The first entry returned by the search for the text “hit man,” for instance, pointed me to a site that contained the book’s text, and another Google search—for “hit man,” “manual for independent contractors,” and “referral,” the pseudonym of the author—found seven more copies. And because many such sites appear to be mirror sites run by people who intend only to fight censorship, not to facilitate crime, they are legally immune from laws that punish intentionally crime-facilitating speech.

To try to adequately suppress these sites, then, the U.S. government would have to prohibit *knowingly* crime-facilitating speech and not just intentionally crime-facilitating speech—a broad ban indeed, which may encompass many textbooks, newspapers, and other reputable publishers. And even that would do little about foreign free speech activists who may respond to the crackdown by putting up new mirror sites, unless the United States gets nearly worldwide support for its new speech restriction. Moreover, unlike in other contexts, where making unprotected material just a little less visible may substantially decrease the harm that the material causes,⁷³ here most of the would-be criminal users are likely to be willing to invest a little effort into finding the crime-facilitating text. And a little effort is all they’re likely to need.

This substantially decreases the benefits of banning crime-facilitating speech—though, as Part I.A described, it doesn’t entirely eliminate those benefits—and thus makes it harder to argue that these benefits justify the costs. Broadly restricting all intentionally crime-facilitating speech, for instance,⁷⁴ might seem appealing to some if it will probably make it much harder for people to commit crimes. It should seem less appealing if it’s likely to make such crimes only a little harder to commit, because the material could be freely posted on mirror sites.

Of course, this presupposes the current Internet regulatory framework, where the government generally leaves intermediaries, such as service providers and search engines, largely unregulated. Under this approach, civil lawsuits or criminal prosecutions will do little to suppress the online distribution of *Hit Man* or *The Anarchist Cookbook*, even if the law purports to broadly ban knowingly crime-facilitating speech.

But say Congress enacts a law that requires service providers or search engines to block access by the provider’s subscribers or search engine’s users to any site, anywhere, that contains the prohibited crime-facilitating works. Presumably, the law would have to require that providers and search engines (a)

73. For instance, when the speech is libel, tangible copies that infringe copyright, speech that reveals private facts about a person, or obscene spam that’s sent to unwilling viewers, reducing the dissemination of the speech would roughly proportionately reduce the harm done by that speech.

74. See, e.g., Part III.B.2.

block access to Web sites that are on a government-maintained list of sites containing those works, and (b) electronically examine the content of other sites for certain tell-tale phrases that identify the prohibited works. There would also have to be a way for prosecutors to quickly get new sites and phrases added to the prohibited lists.

Service providers would also have to block access to any offshore relay sites that might make it possible to evade these U.S. law restrictions. This might indeed make the material appreciably harder to find, though of course not impossible (after all, the bomb recipes in *The Anarchist Cookbook* are also available, though perhaps in less usable form, in chemistry books).⁷⁵

This law, though, would be much more intrusive—though perhaps much more effective—than any Internet regulation that we have today; and I suspect that such a law would face a great deal of opposition. This sort of control would return us, in considerable measure, to the sort of government power to restrict access to material that we saw in 1990: far from complete power, but still greater than we see today. Yet I doubt, at least given today's political balance, that such a proposal would succeed. So the example of crime-facilitating speech shows how far the Internet has reduced the effectiveness of at least a certain form of government regulatory power—and how much would have to be done to undo that reduction.

Crime-facilitating speech thus remains one of the most practically and theoretically important problems, and one of the hardest problems, in modern First Amendment law. I hope this Article will help promote a broader discussion about how this problem should be solved.

75. Cf. 18 PA. CONS. STAT. § 7626 (2004) (trying to institute a much narrower version of this aimed at ordering service providers to block access to child pornography); Emma-Kate Symons, *Labor Plan to Shield Kids from Net Porn*, AUSTRALIAN, Aug. 16, 2004, at 5 (discussing proposal aimed at ordering service providers to block access by children to hardcore pornography).